Volume 8, No. 2, Pages 316 to 590, January 11 - January 22, 1993

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Citation Form: 8 FCC Rcd 1 (1993)

***(Chairman Sikes resigned effective January 19, 1993.)**

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-307

In re Applications of

SUNKISSED BROADCASTING, INC. File No. BPCT-910617KE

BEACH TV PROPERTIES, INC. File No. BPCT-910815KE

For Construction Permit
Panama City Beach, Florida

HEARING DESIGNATION ORDER

Adopted: December 15, 1992; Released: January 11, 1993

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 46, Panama City Beach, Florida.[1]

2. Section 73.685(f) of the Commission's Rules requires an applicant proposing to use a directional antenna to include a tabulation of the relative field pattern, oriented so that 0^0 corresponds to True North and tabulated at least every 10^0 plus any minima or maxima. The data supplied by Beach TV is inaccurate and insufficient. The directional antenna tabulation submitted does not accurately reflect the horizontal pattern for the specified antenna; i.e., the relative field values at each azimuth do not agree with the values indicated "by the pattern submitted. The applicant, therefore, will be required to recalculate its DA tabulation data and to file a corrected tabulation as an amendment, within 20 days of the release of this Order, with the presiding Administrative Law Judge with a copy each to the Chief, Television Branch, and the Chief, Hearing Branch, Mass Media Bureau.

3. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since these applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the EEE public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

5. IT IS FURTHER ORDERED, That Beach TV Properties, Inc.'s March 20, and May 7, 1992, Petitions for Leave to Amend ARE GRANTED and the accompanying amendments and the amendment for March 16, 1992 ARE ACCEPTED for Section 1.65 purposes only.

6. IT IS FURTHER ORDERED, That Beach TV Properties, Inc. shall recalculate its DA tabulation data and file a corrected tabulation as an amendment, within 20 days of the release of this Order, with the presiding Administrative Law Judge with a copy each to the Chief, Television Branch, and the Chief, Hearing Branch, Mass Media Bureau.

7. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, Room 700, 1919 M Street, N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of the Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer.

[1] On March 16, 1992, Beach TV filed an amendment pursuant to Section 1.65 of the Commission's Rules. The amendment reported the FAA acknowledgement relating to the status of the antenna site. Petitions for Leave to Amend were filed on March 20, and May 7, 1992, after the February 4, 1992 "B" cut-off date. The amendments specified a new site and updated the current filing of assignment of license applications for two low power television stations. The amendments will be accepted for 1.65 purposes only.

Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), Erratum, 6 FCC Rcd 3472 (1991), *recon. granted in part,* 6 FCC Rcd 3403 (1991).

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a) (2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-308

In re Applications of

Caroline K. Powley d/b/a UNICORN SLIDE — File No. BPCT-900518KO

TRUDY M. MITCHELL — File No. BPCT-900726KG

For Construction Permit
Slidell, Louisiana

HEARING DESIGNATION ORDER

Adopted: December 15, 1992; Released: January 11, 1993

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it: (a) the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 54, Slidell, Louisiana; (b) a "Motion to Dismiss or Deny" the application of Trudy M. Mitchell (Mitchell),[1] filed by Unicorn Slide (Unicorn) on June 25, 1991[2] (c) and other pleadings.[3]

2. We note that the transmitter site proposed by Mitchell will be located 0.2 km from the AM non-directional tower of AM station WSLA, Slidell, Louisiana. In the event that Mitchell is the successful applicant in this proceeding, Mitchell's construction permit will be conditioned to ensure that WSLA's radiation pattern is not adversely affected by the construction of the proposed television station.

3. No determination has been reached regarding whether or not the height and location of the tower proposed by Unicorn would constitute a hazard to air navigation. Accordingly, an issue regarding the matter will be specified.

4. From our review of the proposals submitted by Unicorn, we cannot determine whether the applicant is in compliance with the environmental rules set forth in the *Report and Order* in General Docket No. 79-163, 51 Fed. Reg. 14999 (1986). Under the rules, an applicant must determine whether the radiation hazard of its proposals would have a significant environmental effect under the criteria set out in Section 1.1307 of the Commission's Rules. If the application is subject to the environmental processing under the Section 1.1307 criteria, the applicants must then submit an environmental assessment (EA) containing the information delineated in Section 1.1311 of the Commission's Rules. Section 1.1307(b) states that EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radio frequency radiation exceeding specific standards. An examination of Unicorn's application suggests that it has not followed the procedures outlined above. While it is unlikely that an RF problem exists as a result of the height and power proposed by Unicorn, other factors must be evaluated by the applicants in making a final determination. The applicant will be required to file, within 30 days of the release of this Order, a statement or showing with respect to radiation hazards that might have an adverse effect on the quality of the environment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Television Branch, Mass Media Bureau, who will then proceed regarding this matter in accordance with the provisions of Section 1.1308. A copy of the statement must also be filed with the Chief, Hearing Branch, Mass Media Bureau. Accordingly, a contingent environmental issue will be specified, and the comparative phase of the case will be allowed to begin before the environmental phase is complete. See *Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

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[1] Mitchell filed amendments on June 14, 1991 and October 11, 1991 specifying new transmitter sites and thus eliminated the need to specify a short-spacing issue. The amendments will be accepted for this purpose only, but Mitchell will not be allowed any comparative benefits as a result of these amendments.

[2] In essence, Unicorn's motion to dismiss or deny is a predesignation petition to specify issues. Since such petitions are no longer permitted, Unicorn's petition will be dismissed. *Revised Procedures for the Processing of Contested Broadcast Applications*, 72 FCC 2d 202 (1979). Although we will dismiss Unicorn's petition, we note that Unicorn attempts to raise acceptability issues regarding Mitchell's application. It states that Mitchell's application, as originally filed, proposed a short-spaced transmitter site and that Mitchell did not request a waiver of our rules. Thus, Unicorn concludes, the application was patently defective when filed and should therefore be dismissed. We disagree. First, it is settled Commission practice when considering mutually exclusive television applications containing short-spaced proposals, with or without waiver requests, to specify an appropriate issue in the hearing designation order. While Unicorn's application containing a short-spaced proposal without a waiver request may not have been grantable at acceptance, it was substantially complete, which is the requirement for acceptability. Moreover, on June 14, 1991, Mitchell amended her application to specify a fully spaced site and the staff properly accepted the amendment to eliminate a potential hearing issue. We note that under Section 73.3522(b)(2) of the Commission's Rules, amendments may be filed as a matter of right, within 30 days after the release of an Order designating mutually exclusive applications for hearing, to eliminate issues specified in the Order. Thus, it would be a waste of valuable Commission resources to reject Mitchell's amendment which eliminates the need to specify a hearing issue when such an amendment is permissible as set out above. Unicorn also raises questions regarding whether Mitchell tendered the appropriate filing and hearing fees for its application. We have examined this matter and are satisfied that all appropriate fees have been paid. The question of whether Mitchell's filing fee was timely submitted was resolved on February 7, 1991, when the Commission billed Mitchell for the fee. Unicorn did not seek reconsideration of that action.

[3] Unicorn filed amendments to its application on August 13, 1991, December 20, 1991 and February 18, 1992. The amendments reported the ownership interests of Ms. Powley and her immediate family, which is required by Section 1.65 of the Commission's Rules. Because the amendments were not timely filed by the March 13, 1991, "B" cut-off date, they will be accepted for Section 1.65 purposes only.

5. The effective radiated visual power antenna height above average terrain and other technical data submitted by the applicants indicate that there would be significant difference in the size of the area and population that each proposes to serve. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

6. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below:

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Caroline K. Powley, d/b/a Unicorn Slide:

(a) whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation;

(b) if a final environmental impact statement is issued in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

2. To determine, which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1(a).

9. IT IS FURTHER ORDERED, That the Motion to Dismiss or Deny filed by Caroline K. Powley, d/b/a Unicorn Slide IS DISMISSED.

10. IT IS FURTHER ORDERED, That the amendments filed by Caroline K. Powley, d/b/a Unicorn Slide on August 13, 1991, December 20, 1991 and February 18, 1992, respectively, ARE ACCEPTED for filing for 1.65 purposes only.

11. IT IS FURTHER ORDERED, That the amendments filed by Trudy M. Mitchell on June 7, 1991 and October 11, 1991, respectively, ARE ACCEPTED for filing in order to eliminate a short-spacing issue and no comparative benefit shall accrue to Mitchell as a result of the filing of the amendments.

12. IT IS FURTHER ORDERED, That, in the event that Trudy M. Mitchell is the successful applicant in this proceeding, the construction permit shall be conditioned as follows:

Prior to construction of the tower authorized herein, permittee shall notify AM station WSLA, Slidell, Louisiana, so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C., to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission.

13. IT IS FURTHER ORDERED, That Caroline K. Powley, d/b/a Unicorn Slide, submit an amendment containing an environmental statement as explained in paragraph 4, above, to the presiding Administrative Law Judge and a copy to the Chief, Television Branch and the Chief, Hearing Branch, Mass Media Bureau, within 30 days after this Order is released.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, Room 700, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standard-

ized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See Generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990). Erratum, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-309

In re Applications of

LOCAL TELEVISION ASSOCIATES, INC.	File No. BPCT-911106KF
CHARLES FITZGERALD	File No. BPCT-920114KF
WEBBER/MOORE BROADCASTING COMPANY LIMITED PARTNERSHIP	File No. BPCT-920114KG
LP MEDIA INCORPORATED	File No. BPCT-920113KE (Application Dismissed)

For Construction Permit
Jacksonville, North Carolina

HEARING DESIGNATION ORDER

Adopted: December 15, 1992; Released: January 11, 1993

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 35, Jacksonville, North Carolina.

2. The Commission's Rules require mutually exclusive applicants for broadcast facilities to pay their hearing fees before they are designated for a comparative hearing. *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases,* 6 FCC RCD 157, 158, *recon. gtd. in part,* 6 FCC Rcd 3403 (1991). Failure to make the hearing fee payment in a timely manner mandates dismissal of an application. 47 C.F.R. § 1.1107(b). On January 24, 1992, the Commission released a Public Notice, Report No. B-160, listing the competing applications for Channel 35, Jacksonville, North Carolina. LP Media Incorporated's application was among those listed. The notice established April 8, 1992, as the deadline for the filing of the hearing fee. LP Media Incorporated did not file the required hearing fee. Therefore, LP Media Incorporated's application will be dismissed pursuant to 47 C.F.R. § 1.1107(b).

3. Section 73.3555(a)(3) of the Commission's Rules states that no license for a television broadcast station shall be granted to any party, if such party directly or indirectly owns, operates, or controls one or more broadcast stations in the same service and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed TV stations, computed in accordance with Section 73.384. Local Television is the licensee of television station WFXI, Morehead City, North Carolina. The Grade B contour of Local Television's proposed television station will overlap with the Grade B contour of station WFXI, Morehead City, North Carolina. However, Local Television has represented to the Commission that it will divest its interest in WFXI, Morehead City, North Carolina, prior to the commencement of operation of Channel 35, Jacksonville, North Carolina, if Local Television is the successful applicant. Accordingly, any grant of a construction permit to Local Television will be conditioned upon its divestiture of all its interest in, and connection with, television station WFXI.

4. Charles Fitzgerald identifies his tower site coordinates at 34^0 29' 28" latitude; however, the Federal Aviation Administration (FAA) describes the tower to be located at coordinates 34^0 29' 38" latitude. There is a discrepancy in the coordinates, and we have not received a final determination from the FAA that Mr. Fitzgerald's proposed tower height and location would not constitute a hazard to air navigation. Accordingly, an appropriate issue will be specified.

5. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since these applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Charles Fitzgerald, whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

7. IT IS FURTHER ORDERED, That, the application for LP Media, Inc., IS DISMISSED, pursuant to 47 C.F.R. § 1.1107(b).

8. IT IS FURTHER ORDERED, That in the event of a grant of Local Television Associates, Inc.'s application, it will be conditioned as follows:

Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that it has divested itself of all interest in, and connection with WFXI(TV), Morehead City, North Carolina.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of

record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, Room 700, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), Erratum, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Metro Media Broadcasting, Inc.
Licensee of Station WQPW(FM)
Valdosta, Georgia
for Forfeiture

File No. BRH-881201ZJ

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1992; Released: January 11, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration a Notice of Apparent Liability (NAL) for forfeiture issued to Metro Media Broadcasting, Inc., licensee of Station WQPW(FM), Valdosta, Georgia, as part of the Commission's disposition of a petition to deny filed against that station. *In Re Applications For Renewal of Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia,* 6 FCC Rcd 5968 (1991). The NAL for $15,000 was issued for violations of Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080. The licensee requests remission or mitigation of the forfeiture.

II. BACKGROUND

2. The Memorandum Opinion and Order, released October 22, 1991, set out a record of inadequate EEO efforts at WQPW(FM). Review of the station's renewal application, opposition to the petition to deny, and inquiry response revealed that the licensee often failed to notify recruitment sources of specific job openings and failed to meaningfully self-assess its EEO program. In addition, the licensee failed to employ a member of the dominant minority until the last year of the license term.

III. PLEADINGS

3. In its response to the NAL, the licensee seeks remission or mitigation of the forfeiture because it is experiencing financial hardship. It contends that it is unable to pay the NAL because it has experienced a net loss at the station for the last two years. Moreover, it states that this loss has resulted in the need to reduce full-time staff, cut discretionary equipment expenses and reduce program services. It argues that if it were required to pay the forfeiture, "its ability to serve its listeners would be further diminished." While it does not dispute the Commission's conclusion that its employment of minorities during the license term was deficient, it argues that the Commission's finding of no evidence of discrimination by the licensee was equally significant. It adds that it has entered into an agreement with the NAACP in which the licensee promises to establish a minority internship program at the station and regularly consult with an NAACP representative throughout the current license term. Finally, the licensee states that its statistical record has improved since the end of the license term in question.

IV. DISCUSSION

4. Once a Notice of Apparent Liability for forfeiture has been issued, the respondent must show in writing why a forfeiture penalty should not be imposed, why it should be reduced or, in the alternative, pay the forfeiture. Any showing by the respondent to support its request must include a detailed factual statement and such documentation and affidavits as may be pertinent. 47 C.F.R. Section 1.80(f)(3). The factors that the Commission takes into account when determining the amount of a forfeiture penalty include "the nature, circumstances, extent, and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 C.F.R. Section 1.80(b)(4).

5. A claim of financial hardship can be a mitigating factor to be weighed against the imposition of a forfeiture. However, the statement submitted by the licensee in response to the Notice of Apparent Liability does not provide a basis for remitting or mitigating the forfeiture. The financial records submitted by the licensee are not sufficient to prove that it is unable to pay the forfeiture. Even the accountants who prepared the documentation commented on its incompleteness in an attachment to the licensee's petition. They stated that:

> Management has elected to omit substantially all of the disclosures and the statements of cash flows and retained earnings required by generally accepted accounting principles. If the omitted disclosures and statements of cash flows and retained earnings were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

6. Moreover, we note that the increase in WQPW's minority employment and the agreement with the NAACP to improve its EEO program does not constitute grounds for reconsideration. As stated in previous orders, the Commission does not consider post-term improvement where, as here, there is no evidence that the post-term improvement was a result of efforts made during the license term. *Rust Communications Group, Inc.,* 73 FCC 2d 39 (1979).

V. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Metro Media Broadcasting, Inc., FORFEIT to the United States the sum of fifteen thousand dollars ($15,000) for violation of the Commission's EEO Rule, 47 C.F.R. Section 73.2080. Full payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission within 30 days of the release date of this Order. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section

1.80 of the Commission's Rules, 47 C.F.R. Section 1.80 and Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 504(a), as summarized in the attachment to this Memorandum Opinion and Order.

8. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Forfeiture to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MURRAY HILL BROADCASTING COMPANY — File No. BPH-870225IP

For a Construction Permit for
Minor Changes in Station WQMG-FM,
Greensboro, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1992; Released: January 11, 1993

By The Commission:

1. The Commission has before it for consideration (a) an Application for Review, filed August 8, 1988, by Murray Hill Broadcasting Company ("Murray"), licensee of Station WQMG-FM, Greensboro, North Carolina; (b) an Opposition thereto, filed August 23, 1988, by Wilkes Broadcasting Company ("Wilkes"), licensee of Station WKBC-FM, North Wilkesboro, North Carolina; and (c) related pleadings.

2. Murray requests that the Commission review and reverse the staff action of June 29, 1988, which rejected Murray's application, as originally filed, but granted Murray's application, as amended. For the reasons that follow, we affirm the staff action.

BACKGROUND

3. Station WQMG-FM is a Class C station, which, at the time Murray filed the captioned application, was licensed to operate on Channel 246 with 100 kW effective radiated power ("ERP") at 157 meters height above average terrain ("HAAT"). Station WKBC-FM, also a Class C facility, is licensed to operate on first adjacent Channel 247. The stations were, at the time the captioned application was filed, located 123.2 km apart and considered "grandfathered" short-spaced stations under former § 73.213 of the Commission's Rules.[1]

4. Murray filed the captioned application on February 25, 1987, to preserve WQMG-FM's Class C status, in accordance with *FM Broadcast Stations*, 94 FCC 2d 152 (1983). The application proposed to move WQMG-FM's transmitting antenna 8.1 kilometers closer to WKBC-FM (thus, reducing the short separation to 115.1 km), and to operate WQMG-FM with 22.9 kW ERP (in the direction of WKBC-FM) at 315 meters HAAT.

5. Murray maintained that its proposal satisfied the requirements of then-existing § 73.213. Wilkes argued otherwise in an informal objection to the application, filed on August 4, 1987. In the first of two decisions, the staff, on January 7, 1988, dismissed Murray's application because it proposed an ERP for WQMG-FM which, in the direction of WKBC-FM, exceeded the 10 kW maximum set forth in § 73.213(a) for first adjacent Class C stations located less than 121 km apart.

6. Subsequently, on February 8, 1988, Murray filed a Petition for Reconsideration of the staff action. Therein, Murray argued that the staff had erred in concluding that Murray's proposal violated § 73.213, and, in any event, a waiver of § 73.213 was justified. In the alternative, Murray proffered a contingent amendment to its application which reduced power to comply with the staff's interpretation of § 73.213, as expressed in its January 7, 1988, decision. It was Murray's intention that the amendment be considered only in the event the staff again rejected the original proposal.

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[1] In relevant part, then-existing § 73.213, which applies to this case, provided:

(a) Stations authorized prior to November 16, 1964, at locations that do not meet the minimum distances specified in § 73.207 may apply for changes in facilities if the requested facilities conform to those listed in the following table:

. . . .

Class	Separation First Adjacent	Facilities Power	Authorized Height
C to C	121 - 152 km	20 kW	600 m
C to C	less than 121 km	10 kW	600 m

. . . .

(e) The powers listed in the table are the maximums the FCC will authorize. . . .

. . . .

(f) The following provisions will govern applications for move of transmitter site:

. . . .

(2) Stations short-spaced with respect to other stations under § 73.207 may apply to move transmitter site, even though by the move the separation would be further shortened, under the following conditions and with the following facilities:

. . . .

(ii) When a station does not meet the minimum separations to co-channel or adjacent channel stations, it may apply for up to the maximum facilities for the separations that would exist at the new transmitter site. (See paragraph (f)(2)(iii) of this section for further restrictions on very short-spaced stations.)

(iii) . . . If the [transmitter] move would decrease the short distance by [greater than 5 km], a station will be permitted no more than the facilities that would give it, in the critical direction, a 1 mV/m contour located no further out than that which would result from using the former location and the maximum facilities specified for the distance bracket.

7. By letter, dated June 29, 1988, the staff granted reconsideration to the extent that it approved Murray's amended proposal. Although Murray filed the instant Application for Review seeking reversal of that action, Murray nonetheless made the authorized modifications to WQMG-FM, filed an application for a covering license for the amended facilities (File No. BLH-890425KA) which was granted August 15, 1989, and has been operating in accordance with its amended proposal.

THE ARGUMENTS

8. Murray states that, had sufficient and suitable land been available, it could have applied to operate from its original site with 20 kW ERP at 600 meters HAAT. In support, Murray relies on § 73.213(a), which permits such facilities for first adjacent channel Class C stations separated by 121 km to 152 km.

9. Because Murray's original transmitter site could not accommodate the modifications that Murray desired, Murray proposed to change transmitter sites, thus invoking the provisions of § 73.213(f). According to Murray, then-existing § 73.213(f)(2)(iii) specified certain restricted facilities when the proposed separation between first-adjacent channel Class C stations was less than 121 km *and* the site change decreased the existing short separation by more than 5 km. In such situations, Murray argued, the applicant was limited to facilities which would produce a 1 mV/m contour that extends no further in the critical direction than the 1 mV/m contour that would be produced if the station was operating with maximum height and power, per the table in § 73.213(a), at its original site.

10. In the instant case, according to Murray, the predicted 1 mV/m contour that would be produced by WQMG-FM operating from the proposed site with 22.9 kW ERP at 315 meters HAAT would extend no further toward WKBC-FM than would the predicted 1 mV/m contour that would be produced if the station was operating from its original site with 20 kW ERP at 600 meters HAAT. Moreover, Murray contends that the proposed interfering and protected contours demonstrate that WQMG-FM would cause less interference to WKBC-FM than it would by operating with the maximum allowable facilities at its original site. Thus, Murray argues, its proposal would afford WKBC-FM greater protection from interference than the rule required and was, thus, consistent with the spirit of § 73.213.

11. Although § 73.213(e) states that the powers specified in § 73.213(a) are the maximums that the Commission will authorize, Murray argues that § 73.213(e) is not applicable because § 73.213(e) applies to facilities changes, not site changes. The site change proposed in the instant case is, according to Murray, governed by § 73.213(f)(2)(iii), which specifies a contour restriction, not a power restriction.

12. Murray further states that assuming, *arguendo*, its application, as originally filed, does not comply with § 73.213, a waiver of § 73.213 is warranted. In support, Murray relies on *Bristol Broadcasting Co., Inc.*, 61 FCC 2d 13 (1976), which it characterizes as "a dispositive Commission precedent." Murray also asserts that there are significant public interest benefits which support the grant of a waiver in this instance. Murray states that if its initial proposal were granted, WQMG-FM would serve 334,682 more people and 5,457 more sq. km than the station was serving when the application was filed. Additionally, Murray contends, WQMG-FM would provide new city-grade (3.16 mV/m) service to 324,984 people and 2,977 sq. km.

13. Wilkes argues in its Opposition to Murray's Application for Review that Murray has misinterpreted § 73.213. Wilkes maintains that, based on the explicit language in § 73.213(e), the powers specified in § 73.213(a) are absolute maximums, even for site changes. Thus, according to Wilkes, since the Table of Facilities states that first-adjacent channel Class C stations located less than 121 km apart may not operate with an ERP in excess of 10 kW in the critical direction, and Murray's initial proposal contemplated that WQMG-FM would operate from such a distance with 22.9 kW in the direction of WKBC-FM, Murray's initial proposal clearly violated § 73.213. In its two decisions, the staff rejected Murray's original proposal for precisely this reason.

14. Wilkes further argues that Murray is not entitled to a waiver of § 73.213 because Murray has failed to satisfy the "high hurdle" required by *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Specifically, Wilkes maintains that although *Bristol Broadcasting, supra*, involved the grant of a waiver, the decision is nonetheless inapposite because it did not involve a proposal to exceed the maximum power levels specified in § 73.213(a), the key issue here. Moreover, Wilkes argues that there is nothing unique or compelling about the service gains claimed by Murray because such claims could be made by any applicant which seeks to operate with excessive facilities.

DISCUSSION

15. Sections 73.213(a) and (e), as they existed on February 25, 1987, when Murray filed its captioned application, were intended to establish maximum permissible powers, whether the applicant was proposing a change in facilities or a change in transmitter site. Indeed, § 73.213(e) states in plain, unambiguous language that only antenna heights, not powers, may exceed those listed in § 73.213(a)'s Table of Facilities. It is axiomatic that any reasonable and logical construction of a rule begins with its plain language. *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987).

16. The "further restrictions" embodied in § 73.213(f)(2)(iii) must be read in conjunction with the power limitation provisions of §§ 73.213(a) and (e). The last sentence of § 73.213(f)(2)(iii) was intended to remedy situations where the 1 mV/m contour of a short-spaced station (in this case, a Class C station located less than 121 km from a first-adjacent Class C station) extended prohibitively far despite the 10 km/600 m limitation in § 73.213(a). Pursuant to § 73.213(f)(2)(iii), in such a situation, the applicant was required to "pull back" its 1 mV/m contour to an appropriate distance; that is, to a distance which would not exceed that which would obtain if the station were operating with maximum facilities allowed by § 73.213(a) from its original site. It was contemplated that the applicant could "pull back" its 1 mV/m contour to an appropriate distance by reducing power and/or antenna height from the maximum levels specified in § 73.213(a). It is not consistent to argue that § 73.213(f)(2)(iii) would permit an applicant to exceed the maximum power levels contained in § 73.213(a) in an attempt to produce a 1

mV/m contour of appropriate distance.[2] Indeed, to do so would render § 73.213(e) superfluous, a result which is inconsistent with settled principles of statutory construction. *See, Weinberger v. Hynson, Westcott & Dunning,* 412 U.S. 609, 633 (1973) (a regulation should not be construed to render clauses superfluous, citing "the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect.").

17. There is also no basis for granting a waiver of § 73.213 to Murray. In this regard, we agree with Wilkes that *Bristol Broadcasting, supra,* provides no justification for waiving our rules in this instance, and Murray's claim of significant service gains are claims that any applicant which proposes excessive facilities could proffer. We also note that although the Commission has carved out an exception to the general rule prohibiting applicants from proposing powers in excess of the maximums specified in § 73.213(a), the exception was intended to apply in situations where there is a mutual agreement between the short-spaced stations involved, and then only when the proposal involves a change in facilities. *See, FM Broadcast Rules,* 40 FCC 868 (1964). Indeed, in *Short-Spaced FM Stations,* 57 FCC 2d 1263 (1975), the Commission reiterated that it would not consider a request for excessive facilities despite the existence of a mutual agreement if the proposal in question involved a transmitter site change. Consequently, even if Murray and Wilkes were able to negotiate a mutual agreement allowing WQMG-FM to operate with an excessive power, the Commission would disapprove the requested modifications because the proposed changes involve a transmitter move.

18. There also is another independent basis for rejecting Murray's Application for Review. Section 1.110 of the Commission's Rules states in pertinent part:

> Where the Commission without a hearing grants any application . . . with terms other than those requested . . . the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days . . . file with the Commission a written request rejecting the grant as made.

19. In the instant case, the staff, by delegated authority, granted Murray's application with terms to which Murray objects. That is, the staff granted Murray's amended proposal, rather than its initial proposal. However, Murray failed to challenge the terms of the grant according to the procedure prescribed in § 1.110. To the contrary, Murray effectively accepted the grant when it subsequently modified WQMG-FM as authorized, and sought and received a covering license for the changes. Indeed, since 1989, WQMG-FM has been operating from the site and with the facilities which Murray contests. In this regard, we note that an applicant may not, on the one hand, accept a Commission grant *and,* on the other hand, seek an administrative appeal of the authorization. *See Central Television, Inc. v. FCC,* 834 F.2d 186 (D.C. Cir. 1987) *Capital Telephone Company, Inc. v. FCC,* 498 F.2d 734, 739 (D.C. Cir. 1974). Consequently, having effectively accepted the grant as made *and* having failed to challenge the staff action as required, Murray has foreclosed its opportunity to contest the terms of the construction permit.

20. Although the most recent staff decision may not have articulated a response to every contention raised by Murray in its Petition for Reconsideration, we have carefully considered all of the arguments advanced by Murray in its Application for Review. We conclude that Murray's original proposal violated then-existing § 73.213 and was, therefore, properly dismissed. We further conclude that a waiver of § 73.213 was not justified. Finally, we conclude that the staff action granting recon-sideration to the extent that it approved Murray's amended proposal was proper. Murray's subsequent actions embracing the grant further support our disposition of this case.

21. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed August 8, 1988, by Murray Hill Broadcasting Company, licensee of Station WQMG-FM, Greensboro, North Carolina, IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

[2] We note in this regard, that the Commission historically has refused to authorize excessive power levels in order to compensate for insufficient antenna heights. *See, Revision of FM Rules,* 23 RR 1801, 1831 (1962).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 31, 1992

Released: January 11, 1993

CERTIFIED MAIL NO. P 295 670 787
RETURN RECEIPT REQUESTED

Dexter A. Washburn, Esq.
Mikkelborg, Broz, Wells & Fryer
Attorneys at Law
Suite 3300
1001 Fourth Avenue Plaza
Seattle, Washington 98154 Mail Stop 1500E3

Re: Notice of Forfeiture
issued to Nelbro Packing Co.
on July 6, 1992.
215 FE 0007

Dear Mr. Washburn:

This is in response to a Petition for Reconsideration that you submitted to the Federal Communications Commission (FCC). *See* 47 C.F.R. Section 1.106. Your petition was submitted on behalf of your client, Nelbro Packing Co. (Nelbro), Anacortes, Washington, and objected to a $5,000 monetary forfeiture penalty that the FCC had imposed on Nelbro. As explained below, we are affirming the $5,000 monetary forfeiture penalty.

Our records show that on July 19, 1990, the FCC's Ferndale Office was monitoring frequency 156.375 MHz (channel 67), and recorded Nelbro transmitting on this frequency. Nelbro holds a license issued by the FCC which authorizes it to transmit on channels 10, 16 and 74. On July 23, 1990, the FCC's Ferndale Office issued Nelbro an Official Notice of Violation for transmitting on a frequency not authorized by its station license.

Again, on August 14, 1991, the FCC's Ferndale Office monitored Nelbro transmitting from a private coast station identified as "WQZ378, Nelbro" to a vessel identified as "WRB9517" on 156.425 MHz (channel 68). On September 19, 1991, the FCC's Ferndale Office sent Nelbro an Official Notice of Violation for transmitting on a frequency not authorized by its FCC license. Nelbro responded on September 24, 1991, and admitted the violation, but stated that it believed that it was authorized to transmit on "all VHF channels" rather than just certain channels. On May 28, 1992, the FCC's Ferndale Office issued Nelbro a Notice of Apparent Liability for a monetary forfeiture penalty for a willful violation of Section 301 of the Communications Act of 1934, 47 U.S.C. Section 301. Section 301 prohibits the operation of a radio transmitter except in accordance with an FCC license. Nelbro replied on June 10, 1992. On July 6, 1992, the FCC's Ferndale Office issued Nelbro a Notice of Forfeiture for a $5,000 monetary forfeiture penalty. The FCC's authority to impose monetary forfeiture penalties for violations of the Communications Act is contained in Section 503(b) of the Communications Act. 47 U.S.C. Section 503(b).

Nelbro in its June 10, 1992, letter states that the penalty should not be imposed because it took corrective action to prevent future violations. However, subsequent remedial action, although commendable, does not nullify a forfeiture penalty. *Station KGVI, Inc.*, 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corporation*, 3 FCC 2d 699, 700 (1966). Nelbro, moreover, should have taken corrective action after the FCC issued the first Official Notice of Violation for transmitting on an unauthorized frequency in 1990.

Nelbro also claims that the violation was inadvertent. What Nelbro characterizes as inadvertence does not excuse the violation. The fact that a violation may have occurred through inadvertence does not prevent it from being willful as charged in the FCC's Notice of Apparent Liability issued to Nelbro. For a willful violation to occur, it is only necessary that the violator was aware that he was doing the act in question such as transmitting on a radio. *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992); *See also Standard Communications Corporation*, 1 FCC Rcd 358 (1986).

Nelbro's Petition for Reconsideration argues exclusively and extensively that the violation was not willful. Nelbro states, in part, that a vessel initiated radio communications with it on channel 16, and that Nelbro and the vessel then agreed that "we go to channel 68" to continue the conversation. Nelbro further states that Nelbro's radio "operator did not know that Marine Channel 68 was not one of the frequencies listed on the authorization issued to Nelbro." The FCC's rules, however, require licenses to "be posted at the principal control point for each station." 47 C.F.R. Section 80.405(c). Thus, the FCC license, including a listing of the channels that Nelbro is authorized to use, should have been in plain view of the radio operator.

The FCC's position regarding what constitutes a willful violation is well established. Nelbro was charged with a willful violation because it consciously and deliberately transmitted on channel 68. Charging a willful violation does not mean that Nelbro intended to violate the Communications Act or knew that it was operating its radio transmitter on a channel that was not authorized by its license.

Section 312(f)(1) of the Communications Act defines "willful" as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act ... ." 47 U.S.C. Section 312(f)(1). This definition was intended by Congress to apply to the word willful as used in Section 503 of the Communications Act to assess forfeiture penalties, and to be consistent with the FCC's decision in *Midwest Radio-Television, Inc.*, 45 FCC 1137 (1963). H.R. CONF. REP. NO. 97-765, 97th Cong., 2d Session (1982), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2294-95. Based on the *Midwest Radio-Television* decision, willfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question as opposed to being accidental (such as brushing against a power switch turning on a radio transmitter). Furthermore, to establish a willful violation, it is not necessary to show that a person knew he was acting wrongfully. In addition, one of the main policy factors guiding the FCC in imposing forfeitures has been whether a willful act demonstrated a lack of concern, indifference or laxity regarding compliance with the FCC's rules. *Midwest Radio-Television*, 45 FCC at 1141-42.

Please request your client to submit the $5,000 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. The number 215 FE 0007 should be placed on the check, and it should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If the forfeiture penalty is not paid by the specified date, the forfeiture case may be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

cc: Nelbro Packing Company
1904 Seventh Street
Anacortes, Washington 98221

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 31, 1992

Released: January 11, 1993

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

Christopher C. Smallwood, Esq.
Suite 44
1718 Corcoran Street, N.W.
Washington, D.C. 20009 Mail Stop 1500E3

Re: Notice of Forfeiture
issued to Leadman Electronics Inc.
on June 8, 1992.
215CG00016

Dear Mr. Smallwood:

This is in response to your Petition for Reconsideration dated June 22, 1992, and submitted to the Federal Communications Commission (FCC) under Section 1.106 of its rules. 47 C.F.R. Section 1.106. You requested reconsideration of a $7,000 monetary forfeiture penalty imposed on Leadman Electronics, Inc., Santa Clara, California, by the FCC's Chicago Office. As explained below, we are affirming the $7,000 monetary forfeiture penalty.

Our records show that on April 6 through 9, 1992, Leadman Electronics displayed a personal computer monitor, model KUO Feng GBVCA-17, at the Spring '92 COMDEX computer trade show in Chicago, Illinois. On or about April 6, an FCC engineer visited Leadman Electronics' booth to determine whether the computer equipment on display had labels required by the FCC, and to record the FCC identifier on the label. The purpose of the label is to indicate that a radio frequency device has been authorized by the FCC, and the FCC identifier is a unique identification code that is assigned to each FCC authorized radio frequency device. The GBVCA-17 monitor had an FCC label and FCC identifier. The label reflected that the FCC's authorization had been issued to Leadman Electronics as opposed to another party.

The FCC engineer recorded the FCC identifier and then checked it with the FCC's data base. The identifier was not listed in the data base, and, therefore was not a valid identifier. The FCC engineer returned to Leadman Electronics' booth and looked at the identifier again on the GBVCA-17 monitor to make certain he had correctly recorded the code. When this was verified, he informed the Leadman Electronics' personnel at the booth that the GBVCA-17 monitor had not been approved by the FCC, and that it was being displayed in violation of the FCC's rules.

On May 20, 1992, the FCC's Chicago Office issued Leadman Electronics a Notice of Apparent Liability for a willful violation of Section 302(b) of the Communications Act of 1934, and Section 2.803 of the FCC's rules by exhibiting the KUO Feng GBVCA-17 monitor without FCC authorization. 47 U.S.C. Section 302(b), and 47 C.F.R. Section 2.803. Leadman Electronics responded on May 29. On June 8, the FCC's Chicago Office issued Leadman Electronics a Notice of Forfeiture for a $7,000 monetary forfeiture penalty.

Section 302 of the Communications Act authorizes the FCC to regulate the interference potential of radio frequency devices, and prohibits the marketing of devices that fail to comply with the FCC's rules. Section 2.803 of the FCC's rules prohibits the marketing, including the displaying, of radio frequency devices that have not received FCC authorization. Personal computers and their peripheral devices must be authorized by the FCC. The type of authorization that is required is certification. 47 C.F.R. Sections 15.3(i), (r) and (s), and 15.101. Sections 2.901 through 2.1065 of the FCC's rules explain the equipment authorization procedures. 47 C.F.R. Sections 2.901 - 2.1065. To be FCC authorized, personal computers and their peripherals must meet technical standards designed to promote the efficient use of the radio spectrum and to minimize the possibility that these devices will cause interference to other electrical equipment. 47 C.F.R. Section 2.901 and 15.105(b). Furthermore, FCC authorized devices must have a label, which includes an FCC identifier, reflecting that the devices have been authorized by the FCC. 47 C.F.R. Section 2.925, 2.926 and 15.19. However, Section 2.803 provides a limited exemption that allows an unauthorized computer to be displayed if it is accompanied by a conspicuous notice that it has not been authorized by the FCC and may not be offered for sale. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934. 47 U.S.C. Section 503(b).

Leadman Electronics states several reasons why it should not be subject to a monetary forfeiture penalty. It claims that the KUO Feng GBVCA-17 monitor was authorized by the FCC at the time it was displayed in April 1992, at the COMDEX computer trade show in Chicago, and it provided a copy of an FCC certification issued to KUO Feng Corporation on September 4, 1990, for a color monitor.

Leadman Electronics had on display at the trade show another KUO Feng monitor that had been authorized by the FCC. The model number for this monitor was GBVCK-14. It is possible that the FCC certification that Leadman Electronics presented is for this monitor. The KUO Feng GBVCA-17 monitor, which was subject to the monetary forfeiture penalty, was not authorized by the FCC until August 1992. Therefore, it was not authorized at the time of the trade show in April 1992. Furthermore, the label that the FCC engineer observed on the GBVCA-17 monitor indicated that the FCC authorization had been issued to Leadman Electronics and not KUO Feng Corporation.

Leadman Electronics also claims that the second time the FCC engineer visited its booth at the trade show, he "indicated that FCC number on monitor was not in FCC filing and he would recheck his information. We asked him whether we also need to display ... label on monitor" that it had not been approved by the FCC and could not be offered for sale? "[H]e said we *did not need* to do at that moment and he would inform us at the earliest opportunity *in the event* that we need to. Until the show is ended,

he did not return again." Thus, Leadman Electronics states that it "was acting under the explicit guidance of the Commission's staff."

The FCC engineer provided advice to some participants at the trade show regarding the need for a conspicuous notice that a device could not be offered for sale if it had not been authorized by the FCC, but he denies making the statement quoted above. The FCC's rules, moreover, had already been violated by displaying the unauthorized monitor before the FCC engineer returned the second time. Once the FCC inspector had determined that the rules were being violated, which occurred during his second visit to Leadman Electronics, it is difficult to imagine that he would condone or encourage the continuation of the violation.

Finally, Leadman Electronics states "Given the singularly uninformative nature of the Bureau's June 8 letter, Leadman is simply not in a position to respond to any additional problems or concerns which the staff may have. Under the Commission's Rules, Section 1.80(f)(1)(i), the agency is required to inform with *specificity* the

> provision, term or condition of any Act, rule, regulation, order ... or instrument of authorization which the respondent has apparently violated or with which he has failed to comply."

The June 8 letter that Leadman Electronics refers to is the Notice of Forfeiture issued by the FCC's Chicago Office. It would have been useful if this Notice had responded to Leadman Electronics' arguments, and the FCC's field offices are encouraged to do this. If field offices fail to respond to arguments, this may encourage appeals to attempt to resolve the issues which may have occurred in this case. It is preferable in most cases to try to resolve issues in forfeiture proceedings at the field office level and at the earliest time, if possible. However, there is no legal requirement that a Notice of Forfeiture address the issues raised in a person's response to a Notice of Apparent Liability. *See* 47 U.S.C. Section 155(c)(5), and 47 C.F.R. Section 1.80(f)(4).

Regarding the claim that the Notice of Forfeiture violated Section 1.80(f)(1) of the FCC's rules by providing insufficient information, the subsection of the rules cited prescribes the content of Notices of Apparent Liability not Notices of Forfeiture. 47 C.F.R. Section 1.80(f)(1). The Notice of Apparent Liability issued to Leadman Electronics provided the information required by Section 1.80(f)(1). Furthermore, Leadman Electronics, citing Section 1.80(f)(1), complains that the Notice of Forfeiture did not state the "provision ... of ... [the] Act [and] rule ... which the respondent has ... violated ... ." The Notice of Forfeiture provided this information.

Please request your client to submit the $7,000 monetary forfeiture penalty within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. The number 215CG00016 should be placed on the check, and it should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be referred to the U.S. Attorney for collection through a civil suit as provided in Section 504(a) of the Communications Act. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

cc: Leadman Electronics Inc.
2090 Gordon Avenue
Santa Clara, California 95051

Attention: Mr. Glen Shih, President

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 31, 1992

Released: January 11, 1993

FEDERAL EXPRESS NO. 5734329381

Palmcom International Ltd.
Unit 9
15/F Metro Centre
32 Lam Hing Street
Kowloon Bay
Kowloon, Hong Kong Mail Stop 1500E3

Re: Notice of Forfeiture
issued to Palmcom
International
on June 26, 1992.
215 CG 0019

Attention: Mr. Philip Choy
Assistant General Manager

Dear Palmcom International:

This is in response to your letter to the Federal Communications Commission (FCC) dated July 2, 1992, in which you request an appeal and reconsideration of a $5,600 monetary forfeiture penalty that had been imposed by the FCC on Palmcom International (Palmcom).

We are treating your request as a Petition for Reconsideration under Section 1.106 of the FCC's rules. 47 C.F.R. Section 1.106. As explained below, we are affirming the $5,600 monetary forfeiture penalty.

Our records show that Palmcom was displaying a Palmtop 286 portable computer at the Spring 92 COMDEX computer trade show in Chicago, Illinois, on April 6 through 9, 1992. An FCC inspector visited Palmcom's display and observed that the Palmtop 286 computer did not have a label indicating that it had been authorized by the FCC. On May 20, 1992, the FCC's Chicago Office issued Palmcom a Notice of Apparent Liability for a $7,000 monetary forfeiture penalty because it displayed a computer that had not been authorized by the FCC. The Notice stated that this was a willful violation of Section 302(b) of the Communications Act of 1934 and Section 2.803 of the FCC's rules. 47 U.S.C. Section 302(b) and 47 C.F.R. Section 2.803. Palmcom responded on June 5, 1992. On June 26, the FCC's Chicago Office issued Palmcom a Forfeiture Order for a $5,600 monetary forfeiture penalty. The penalty was reduced from $7,000 to $5,600 based on guidance provided by the FCC's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd. 4695 (1991), *modified in part on recon.*, FCC 92-212, released June 4, 1992.

Section 302 of the Communications Act authorizes the FCC to regulate the interference potential of radio frequency devices, and prohibits the marketing of devices that fail to comply with the FCC's rules. Section 2.803 of the FCC's rules prohibits the marketing, including the displaying and advertising, of radio frequency devices that have not received FCC authorization. Personal computers must be authorized by the FCC. 47 C.F.R. Sections 15.3(i), (r) and (s), and 15.101. Furthermore, FCC authorized devices must have a label reflecting that the devices have been authorized by the FCC. 47 C.F.R. Sections 2.925, 2.926 and 15.19. However, Section 2.803 provides a limited exemption that allows an unauthorized computer to be displayed if it is accompanied by a conspicuous notice that it has not been authorized by the FCC and may not be offered for sale. Palmcom did not exhibit this notice. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934. 47 U.S.C. Section 503(b).

Palmcom states several reasons why it should not be subject to a monetary forfeiture penalty. First, Palmcom explains that since it is a new company and the Palmcom 286 was its first product, it did not have experience in marketing computer products and was not aware of the FCC's regulations. However, unfamiliarity with an FCC rule does not excuse a violation of the rule. *E.g., Triad Broadcasting Co., Inc.*, 96 FCC 2d 1235, 1242; 55 RR 2d 919, 924 (1989). A violation of an FCC rule, moreover, may occur "irrespective of any intent to violate any ... rule or regulation of the Commission ... ." 47 U.S.C. Section 312(f)(1). In other words, to establish a violation of an FCC rule, it is not necessary to show that a person knew he was acting wrongfully. *Midwest Radio-Television, Inc.*, 45 FCC 1137, 1141-42 (1963).

Second, Palmcom states that "The product we displayed ... was only a non-functioning prototype, and we definitely did not intend to resale it." Although the device itself may not have been for sale and may have been a non-functioning prototype, the displaying of a device that represents a radio frequency device that had not been authorized by the FCC violates Section 2.803 of the FCC's rules. The displaying of the device, moreover, was a form of advertising which is also prohibited by Section 2.803. The apparent purpose in displaying the device was to market it, namely, to generate either immediate or future orders to buy the device. Often at a trade show or even in a store, there is no intent to sell the actual device on display, but the device is used to generate orders. The actual device that is sold may not have been constructed or assembled at the time a purchase order is placed.

At the computer trade show, Palmcom was also distributing advertising literature describing the features of the Palmcom 286 computer. Since Section 2.803 prohibits the advertising of devices that have not been authorized by the FCC, this advertising literature violated Section 2.803. This violation was independent of the violation resulting from the displaying of the non-functioning prototype computer.

Third, Palmcom states that it took prompt corrective action. However, remedial action to correct a violation, although commendable, does not nullify a forfeiture penalty. *E.g., Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

Finally, Palmcom argues that the violation was not willful. The FCC's Notice of Apparent Liability charged a willful violation because displaying the computer complied with the definition of the word willful in Section 312(f)(1) of the Communications Act of 1934. Section 312(f)(1) of this Act defines "willful" as "the conscious and deliberate

commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission ... ." 47 U.S.C. Section 312(f)(1). This definition was intended by Congress to apply to the word willful as used in Section 503 of the Communications Act to assess forfeiture penalties, and to be consistent with the FCC's decision in *Midwest Radio-Television, Inc.* H.R. CONF. REP. NO. 97-765. 97th Cong., 2d Session (1982), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2294-95. Based on the Midwest Radio-Television decision, willfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question such as displaying or trying to sell a computer. Furthermore, to establish a willful violation, it is not necessary to show that a person knew he was acting wrongfully. *Midwest Radio-Television, Inc.* 45 FCC at 1141-42. *See also Southern California Broadcasting Company,* 6 FCC Rcd 4387 (1991).

Please submit the $5,600 (U.S. dollars) monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place the number 215 CG 0019 on the remittance and send it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482
U.S.A.

Forfeiture penalties not paid within 30 days may be referred to the U.S. Attorney for collection through a civil suit as provided in Section 504(a) of the Communications Act of 1934. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 31, 1992

Released: January 11, 1993

CERTIFIED MAIL NO. P 295 670 786
RETURN RECEIPT REQUESTED

Jill Abeshouse Stern, Esq.
Attorney
Miller & Holbrooke
1225 19th Street, N.W., Suite 400
Washington, D.C. 20036 Mail Stop 1500E3

Re: Notice of Forfeiture
issued to
Metropolitan Houston Paging Services
on May 10, 1991.
DL-91-227
3153404-91043
3153404-91044

Dear Ms. Stern:

This is in response to the Petition for Reconsideration dated June 10, 1991, that you submitted to the Federal Communications Commission (FCC) under Section 1.104 of the FCC's rules. *See also* Section 1.106. 47 C.F.R. Section 1.104 and 1.106. You requested reconsideration of two $2,000 monetary forfeiture penalties that had been assessed against Metropolitan Houston Paging Services (MHP), Sugarland, Texas, by the FCC's Dallas Office. As explained below, the two monetary forfeiture penalties are reduced to a single $2,000 monetary forfeiture penalty, and this penalty is affirmed.

Our records show that on March 5, 1991, an FCC inspector visited an antenna tower structure in the vicinity of Mount Pleasant, Texas, and observed that the lights on the tower were out at a time when they should have been on. The FCC inspector returned to the tower the following night and found that the tower was lit, but no lights were flashing. The FAA was contacted, and it was determined that the FAA had not been notified that the tower lights were out, or when lit, not flashing. Four people living near the tower were also contacted regarding their observations of the tower lights and they stated that the flashing beacons on the tower had been out for a considerable period. One person said that all of the lights had been out for a day or two, and a second person said he was certain that all of the lights had been out from March 3 until late March 5. The FCC inspector then interviewed Mr. Spann, the owner of the tower. Mr. Spann was asked how he monitored the lights on the tower, and he replied that there was a person near the tower that would contact him if there were problems. He was also asked how often he checked the lights on the tower. Mr. Spann answered that he did not check the lights on a regular basis and that he did not know how long all of the lights on the tower had been out. Mr. Spann also said that the top and midpoint flashing beacons had been replaced on February 26 or 27 because they had been shot out, however, the new bulbs failed to flash. He further stated the FAA had not been notified that the tower lights were out or not flashing.

On April 5, 1991, the FCC's Dallas Office issued two Notices of Apparent Liability to MHP for repeated violations of Sections 17.27 (requires the lighting of towers), 17.47 (requires tower lights to be inspected every 24 hours), and 17.48 (requires notification to the FAA concerning improperly functioning tower lights). 47 C.F.R. Section 17.27, 17.47 and 17.48. Two Notices of Apparent Liability were issued because MHP held two licenses on the tower. MHP replied on May 1. On May 10, the FCC's Dallas Office issued two Notices of Forfeiture to MHP. Each notice imposed a $2,000 monetary forfeiture penalty on MHP.

Most of the issues raised by MHP were thoroughly discussed in the Notices of Apparent Liability, the Notices of Forfeiture and FCC letters dated July 17 and 19, 1991, to MHP in response to two other Petitions for Reconsideration filed by MHP regarding violations of the FCC's tower lighting and maintenance rules. Therefore, the discussion of issues in the above correspondence is incorporated in this response and will not be repeated.

Several issues, however, need some elaboration. MHP in its Petition for Reconsideration states that "In the NAL's, the FCC does not identify the source of its information about the tower lighting prior to March 5, other than to refer to further investigation. Without this information, it is virtually impossible for MHP to verify the circumstances on which the forfeitures are based." It appears that this is the first time that MHP raised this issue. The FCC's Notices of Forfeiture, moreover, explained that "Interviews were conducted with several persons living near the tower ... . Based on information provided in those interviews, it was determined that the flashing beacons on the tower had been out for several days on different occasions and that all lights had been out during the period of Sunday, March 3, 1991 until the evening of March 5, 1991." One of the persons the FCC interviewed requested anonymity and he was told that the FCC would attempt to honor his request although this could not be guaranteed.

MHP also states "that a discrepancy appears to exist between the FCC's information and information provided by Mr. Spann" to MHP. To a considerable degree, the monetary forfeiture penalties were based on information that Mr. Spann provided to the FCC inspector and this information was discussed above.

The monetary forfeiture penalty, moreover, is justified by facts upon which there is agreement. The Notices of Apparent Liability stated that based on information provided by Mr. Spann, the midpoint and top beacons had not been flashing since at least late February and Mr. Spann had been aware of this. The FCC inspector also observed this on March 6. MHP in its May 1 and June 10 correspondence further stated that these lights were not flashing "during the period in question." Thus, there is agreement that the lights were not flashing over a period of several days. Section 17.27 of the FCC's rules requires that these lights flash. Section 17.48(a), as explained in the Notices of Apparent Liability, further requires that the FAA be notified of any "known ... improper functioning ... of any flashing ... light ... ." Mr. Spann, MHP and the FCC agree that the FAA was not notified. MHP's only defense regard-

ing this specific issue is that "Spann did not notify the FAA of the lighting problems because it was the owner's understanding of Section 17.48(a) of the rules that notification was only required if the lights were burned out" and not when they were lit, but failed to flash. MHP presented this same defense in another Petition for Reconsideration, and the FCC replied in its July 17, 1991, letter that "a misunderstanding or unfamiliarity with an FCC rule ... does not excuse a violation." *E.g., Triad Broadcasting Co., Inc.*, 96 FCC2d 1235, 1242; 55 RR2d 919, 924 (1989)." Furthermore, Section 17.48(a) of the FCC's rules is clear that it applies to any "improper functioning ... of any flashing ... light."

Based on this violation alone; namely, that the lights failed to flash, that Mr. Spann was aware of this, and that the FAA was not notified; the FCC's Dallas Office properly imposed a $2,000 monetary forfeiture penalty. The amount of the forfeiture is authorized by Section 503(b) of the Communications Act of 1934, and is within the range of penalties imposed for similar violations. 47 U.S.C. Section 503(b).

Finally, MHP states that it "acknowledges that it has two separate licenses in connection with its Mount Pleasant tower." But then MHP appears to claim that it really has only one station or license on the tower since the second license is for an auxiliary control station that is associated with the base station, and, therefore, is part of the base station. One of the two monetary forfeiture penalties is canceled. The total monetary forfeiture penalty, therefore, is reduced from $4,000 to $2,000.

Please request your client to submit the $2,000 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. The number 3153404-91044 should be placed on the check. The other violation numbered 3153404-91043 is canceled. The check should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeitures not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

cc: Metropolitan Houston Paging Services, Inc.
14141 Southwest Freeway, Suite 6400
Sugarland, Texas 77478

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 5, 1993

Released: January 11, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

LeSea Broadcasting Corporation 8310-MD
Licensee, KWHE(TV), Honolulu, HI 92070420
61300 South Ironwood
P.O. Box 12
South Bend, IN 46624

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On Saturday, January 11, 1992, Television Station KWHE(TV), Honolulu, Hawaii, broadcast a children's program which appeared to exceed the limits of 10.5 minutes of commercial time per hour in weekend children's programming. 47 C.F.R. § 73.670. Specifically, the 5:00 a.m. broadcast of "Quigley's Village" contained several advertisements featuring characters from the program who urged the purchase of a membership in Quigley's Village and videotapes of the program. The 30-minute program thus appeared, by virtue of its association with a product being sold during commercial breaks in that program, to be a "children's program-length commercial," as defined in our *Report and Order*, 6 FCC Rcd 2111, 2118 (1991). In such case, the entire program would count as commercial time.

The broadcast also appeared to violate Commission policies concerning host selling. Commission policy in effect since 1974 prohibits the use of program characters in commercials run within the program in which the characters appear. *Action for Children's Television*, 50 FCC 2d 1 (1974); *see also* discussion in *Memorandum Opinion and Order*, 6 FCC Rcd 5093, 5097 (1991).

In response to our June 16, 1992, letter of inquiry, you state, by letter dated July 13, 1992, that the advertisements in question were inserted within the bartered program by the distributor prior to receipt by the station. Station management, apparently assuming that the program was in compliance, did not prescreen the show before it aired, a total of 27 times on weekdays and weekends between January 1 and the time you received our letter of inquiry alerting you to the problem. You state that after our letter such advertisements were deleted.

In view of the above, it appears that on January 11, 1992, and on the other 26 dates you have provided, Television Station KWHE, Honolulu, Hawaii, repeatedly violated 47 C.F.R. § 73.670 by airing 30 minutes of commercial time during each showing of "Quigley's Village" -- substantially more than the 10.5-minute per hour limit for weekend children's programming and the 12-minute per hour limit for weekday children's programming. Accordingly, LeSea Broadcasting Corporation is hereby advised of its APPARENT LIABILITY FOR A FORFEITURE of twenty thousand dollars ($20,000). The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. An upward adjustment for repetition seems appropriate in this case.

Furthermore, LeSea Corporation is hereby ADMONISHED for violations of our host-selling policy in the 27 broadcasts which are the subject of this letter.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-104

In the Matter of

Amendment of Section 73.202(b),	RM-7668
Table of Allotments,	RM-7763
FM Broadcast Stations.	
(Sun Prairie, Mauston and	
Reedsburg, Wisconsin and	
Freeport, Illinois)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 11, 1992; Released: January 12, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 6 FCC Rcd 2068 (1991), proposing the substitution of Channel 221B1 for Channel 221A at Sun Prairie, Wisconsin, and modification of the license for Station WMAD-FM to specify operation on Channel 221B1. The *Notice* was issued in response to a petition filed by First Choice Communications, Inc. ("petitioner").[2] Petitioner filed comments in support of the proposal. Dennis and JoAnn Best ("Best") filed a counterproposal.[3] Friends Communications, Inc. ("Friends") and WRJC, Incorporated ("WRJC") filed comments. Petitioner, Friends, WRJC and Best filed reply comments.

2. The *Notice* proposed the substitution of Channel 221B1 for Channel 221A at Sun Prairie, Wisconsin and modification of the license for Station WMAD-FM to specify operation on Channel 221B1. To accommodate the upgrade at Sun Prairie, petitioner further proposed the substitution of Channel 275A for Channel 221A, Station WRJC-FM, Mauston, Wisconsin, and substitution of Channel 295A for Channel 221A, Station WFPS(FM), Freeport, Illinois. An *Order to Show Cause* was issued to WRJC, the licensee of Station WRJC-FM, Mauston, and Friends, the licensee of Station WFPS(FM), Freeport, to show cause why their licenses should not be modified accordingly. Petitioner indicated its willingness to reimburse the licensees of Station WRJC-FM and Station WFPS(FM) for the cost of changing their facilities to the new channels.[4] Petitioner was requested to provide a preclusion study demonstrating the impact of allotting Channel 221B1 to Sun Prairie on existing or future noncommercial educational service, in accordance with the *First Report and Order* in MM Docket No. 86-144, 52 FR 8259, March 17, 1989.

3. Best counterproposed the allotment of Channel 275A to Reedsburg, Wisconsin, as that community's second local FM broadcast service. Best states that Channel 275A at Reedsburg will provide a new service while petitioner's proposal will only provide expanded service to Sun Prairie. According to Best, the proposal for Reedsburg should be preferred under the Commission's allotment criteria as it will provide a new voice while the proposal for Sun Prairie will provide additional service for an existing facility.

4. In response to the *Order to Show Cause*, Friends objects to the substitution of Channel 295A for Channel 221A. Friends argues that it will lose a significant portion of its audience and revenues if it is forced to change channels. Friends states that it desires to remain on Channel 221A and upgrade its facility to a six kilowatt operation on its existing channel.[5] Friends requests that if the Commission grants the proposed substitution at Freeport, it should require petitioner to place in escrow the amount estimated to cover the cost involved in changing channels.

5. WRJC also filed comments objecting to a channel substitution. WRJC states that it has operated on Channel 221A for approximately fifteen years and the public served by Station WRJC(FM) is accustomed to its location on the FM radio dial. It claims that its current portion of the band is less crowded than would be the case with Channel 275A. WRJC questions petitioner's ability to reimburse for the channel change and requests the Commission require petitioner to place funds for reimbursement in escrow before issuance of an order directing WRJC to modify its frequency.

6. Petitioner submitted reply comments supporting the substitution of Channel 221B1 for Channel 221A at Sun Prairie, Wisconsin, and the substitutions at Mauston, Wisconsin, and Freeport, Illinois. According to petitioner, its proposal provides for interference-free power increases at Mauston and Freeport and would permit a wide area service at Sun Prairie. Petitioner reiterates its intention to reimburse Stations WRJC(FM) and WFPS(FM) for their reasonable expenses in changing frequencies. Petitioner also provided a preclusion study as requested in the *Notice* which shows that the allotment of Channel 221B1 at Sun Prairie will not cause any significant impact on existing or future noncommercial educational service in the area. Peti-

[1] The community of Reedsburg, Wisconsin, has been added to the caption.

[2] The assignment of the license for Station WMAD-FM, Sun Prairie, from First Choice Communications to DPC, Inc. was granted and consummated on September 18, 1991 (BALH-910726GL). DPC, Inc. has filed an application for the assignment of its license for Station WMAD-FM to WMAD, Inc. (BALH-920925HQ).

[3] Public Notice of the counterproposal was given on July 19, 1991 (RM-7763).

[4] Although petitioner has stated a willingness to reimburse the Mauston and Freeport licensees, it has also stated that should those licensees decide to increase operating power to six kilowatts, those additional expenses should be the responsibility of the respective licensees.

On September 4, 1991, DPC, Inc. filed a letter stating its intention to reimburse the licensees of Station WFPS(FM) and WRJC(FM) for their reasonable expenses if the Commission grants the requested upgrade at Sun Prairie.

[5] Friends has filed an application to increase its power to six kilowatts on Channel 221A (BPH-910610IF).

tioner acknowledges Friends and WRJC's objections to changing channels but points out that the Commission regularly orders channel substitutions where a licensee is seeking to upgrade and expresses its willingness to pay reasonable expenses required in channel changes. In response to concerns over its ability to provide reimbursement, petitioner contends that the channel upgrade is clearly of value to it as it would be to future licensees of Station WMAD-FM and that reimbursement will be made.[6] Petitioner believes the Sun Prairie upgrade provides greater service increases than does the counterproposal filed by Best to allot Channel 275A to Reedsburg. Since neither proposal provides for a first or second full time aural service or a first local service, petitioner contends that each is appropriately considered under the category of "other interest matters" under Commission policy. According to petitioner, the WMAD upgrade will serve 83,241 people while the new allotment at Reedsburg will only serve 51,729 people. Further, the Sun Prairie upgrade will permit interference-free upgrades to six kilowatts at Mauston and Freeport, thereby providing additional service to 13,507 people.

7. In reply comments Best continues to support the allotment of Channel 275A at Reedsburg. Best argues that petitioner incorrectly calculated the population gain for Sun Prairie. According to Best, the Reedsburg allotment results in new service for 51,729 persons while the upgrade at Sun Prairie will provide a gain of 41,788 persons. In addition, Best indicates that allotment of the channel at Reedsburg will provide a fourth full-time aural service to 573 persons and a fifth full-time aural service to 1,085 persons, while the area which will receive service from the proposed Sun Prairie upgrade already receives at least seven full-time services and some portions of the area receive as many as eighteen full-time aural services.

8. We have carefully examined the comments filed in this proceeding. We find that both communities are deserving of receiving new or improved FM service. Sun Prairie is an incorporated community located approximately 16 kilometers (10 miles) north of Madison. The 1990 U.S. Census indicates the population for Sun Prairie is 15,333. Sun Prairie is served by two radio stations, one FM and one AM, which provide the community with local full-time service. Reedsburg, also an incorporated community, is located approximately 80.5 kilometers (50 miles) northwest of Madison and has a 1990 census population of 5,834. There is one AM station and one FM station licensed to Reedsburg. Both communities receive service from numerous AM and FM stations. We have determined that channels are not available to resolve the conflict between the proposals. Therefore, having concluded that the proposals should be comparatively considered, we are guided by the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are:

(1) First fulltime aural service;

(2) Second fulltime aural service;

(3) First local service; and

(4) Other public interest matters.

[Co-equal weight given to priorities (2) and (3)]

The allotment of Channel 221B1 at Sun Prairie or the allotment of Channel 275A to Reedsburg does not fulfill any of the first three priorities since no showing of first or second aural service was provided by petitioner or Best. Thus, a comparison of the communities must be made using priority 4, other public interest matters.

9. The choice must be made between the proposoal to initiate a new service at Reedsburg and the proposal to increase existing service and modify the license at Sun Prairie. The Sun Prairie substitution would also permit the operation of Station WRJC, Mauston, as a six kilowatt facility. Generally, a modification of a license to upgrade facilities to a superior channel is regarded as an increase in existing service which does not provide as great a public benefit as that of a primary service. *See Memorandum Opinion and Order (Benton, Arkansas, et al.)*, 7 FCC Rcd 2555 (1992). In the absence of a showing of need for the proposed increase in service, a conflicting new allotment is usually favored since it represents a new voice in the community. Petitioner failed to provide any information indicating a necessity for expanded service at Sun Prairie that would outweigh the benefits of a new service. Therefore, we believe that the public interest would best be served by allotting Channel 275A to Reedsburg, Wisconsin, as that community's second FM broadcast service. Channel 275A can be allotted to Reedsburg, Wisconsin, in compliance with the Commission's spacing requirements with a site restriction five kilometers (3.1 miles) west of the community.[7] The site restriction at Reedsburg will prevent a short spacing to Station WLZR-FM, Channel 275B, Milwaukee, Wisconsin.

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 25, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Reedsburg, Wisconsin	275A, 285A

11. The window period for filing applications for Channel 275A at Reedsburg, Wisconsin, will open on **February 26, 1993,** and close on **March 29, 1993.**

[6] We note that we do not normally require advance payment or escrow accounts. We expect parties to negotiate in good faith, subject to Commission review in the event of disagreements. Furthermore, no station need take steps to change frequency until it is assured that it will be reimbursed. Affected stations are generally afforded a significant period of time before they are required to change to the new frequencies and it is generally not necessary for a change in frequency to take place until use of the existing frequency actually prevents a newly authorized station from inaugurating service. *See Report and Order (Othello, East Wenatchee and Cashmere, Washington and Wallace, Idaho)*, 6 FCC Rcd 6476 (1991).

[7] The coordinates for Channel 275A at Reedsburg are 43-32-00 and 90-04-00.

12. IT IS FURTHER ORDERED, That the petition filed by First Choice Communications, Inc., requesting the substitution of Channel 221B1 for Channel 221A at Sun Prairie, Wisconsin, and substitutions at Mauston, Wisconsin, and Freeport, Illinois, IS DENIED (RM-7668).

13. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Lawrence Bernstein
Bring & Bernstein
1818 N Street, N.W.
Suite 200
Washington, D.C. 20036
(Counsel for First Choice Communications, Inc.)

WRJC, Incorporated
Station WFPS-FM
Fairway Lane, Box 100
Mauston, Wisconsin 53948

Friends
Communictaions, Inc.
Station WFPS-FM
Box 701
Freeport, Illinois 61032

Erwin Krasnow
Verner, Liifert,
Bernhard, McPherson
& Hand
901 - 15th St., N.W.
Suite 700
Washington, D.C. 20005-2301
(Counsel for DPC, Inc.)

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-213

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Canton and Louisiana, Missouri)	RM-8060

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 11, 1992; Released: January 12, 1993

By the Chief, Allocations Branch:

1. In response to a petition filed by Foxfire Communications, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 6232 (1992), seeking the substitution of FM Channel 271C3 for Channel 271A at Louisiana, Missouri. Petitioner also requests modification of its license for Station KJFM(FM) to specify operation on Channel 271C3. Petitioner filed comments supporting the allotment of Channel 271C3 at Louisiana. Bick Broadcasting Company ("Bick") filed comments.

2. We believe the public interest would be served by the substitution of Channel 271C3 for Channel 271A at Louisiana, since it would provide the community with additional reception service. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site provided Channel 265C3 is substituted for Channel 272C3 at Canton, Missouri.[1] Bick holds the construction permit for Channel 272C3, Station KBXB, Canton. Since Bick consented to the substitution of channels at Canton to accommodate the upgrade at Louisiana, there was no need to issue an Order to Show Cause for the substitution at Canton.[2] Channel 265C3 can be allotted to Canton, Missouri, in compliance with Section 73.207(b) of the Commission's Rules at the existing site for Station KBXB.[3] Channel 265C3, Canton, is short spaced to Station KPCR-FM, Channel 265A, Bowling Green, Missouri, and Station WAHI, Channel 266A, Augusta, Illinois. However, Station KPCR-FM, Bowling Green, has been ordered to Channel 231C3 and Station WAHI, Augusta, has been modified to Channel 253A.[4] Therefore, grant of a license for Station KBXB, Canton, may be withheld until Station KPCR-FM is licensed on Channel 231C3 and Station WAHI is licensed on Channel 253A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 25, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Canton, Missouri	265C3
Louisiana, Missouri	271C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KJFM(FM), Channel 271A, Louisiana, Missouri, IS MODIFIED to specify operation on Channel 271C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the construction permit for Station KBXB, Canton, Missouri, IS MODIFIED to specify operation on Channel 265C3 in lieu of Channel 272C3, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in BPH-900926IA except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with BPH-900926IA, except for the channel

[1] The coordinates for Channel 271C3 at Louisiana are 39-21-57 and 91-16-30.

[2] Petitioner provided a letter from James E. Janes, President, Bick Broadcasting Company, consenting to the substitution of Channel 265C3 for Channel 272C3.

[3] The coordinates for Channel 265C3 at Canton are 40-07-33 and 91-31-42.

[4] Station KPCR-FM, Bowling Green, was modified to specify operation on Channel 231C3 in MM Docket No. 90-131, 5 FCC Rcd 6543 (1990), and Station WAHI, Augusta, Illinois, was modified to specify operation on Channel 253A in MM Docket No. 90-510, 7 FCC Rcd 2099 (1992).

as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Pike County
Broadcasting
Station KPCR-FM
P.O. Box 1
Bowling Green, Missouri 63334

Good News
Broadcasters, Inc.
Station KWHI
Rt. 1, Box 72
Plymouth, Illinois 62367

Bick Broadcasting Company
Station KBXB
119 North Third Street
P.O. Box 711
Hannibal, Missouri 63401

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Foxfire Communications, Inc., licensee of Station KJFM(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-220

In the Matter of

Amendment of Section 73.202(b), RM-8075
Table of Allotments,
FM Broadcast Stations.
(Moose Lake, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 11, 1992; Released: January 12, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making,* 7 FCC Rcd 6372 (1992), issued in response to a petition filed by Agate Broadcasting of Minnesota ("petitioner"). The *Notice* proposed the allotment of Channel 296C3 to Moose Lake, Minnesota, as that community's first local broadcast service. Petitioner filed comments reaffirming its interest in the allotment of Channel 296C3 at Moose Lake. No other comments were received.

2. We believe the public interest would be served by allotting Channel 296C3 to Moose Lake, Minnesota, as it will provide the community with its first local broadcast service. Channel 296C3 can be allotted to Moose Lake consistent with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Since Moose Lake is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 25, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Moose Lake, Minnesota	296C3

4. The window period for filing applications for Channel 296C3 at Moose Lake will open on **February 26, 1993,** and close on **March 29, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 296C3 are 46-27-24 and 92-45-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-8

In the Matter of

Amendment of Section 73.202(b), RM-7713
Table of Allotments,
FM Broadcast Stations.
(Stock Island, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 11, 1992; Released: January 12, 1993

By the Chief, Allocations Branch:

1. Pursuant to the request of S-3 Communications Corporation ("S-3"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 667 (1992), issued in response to a petition for rule making proposing the allotment of Channel 248A to Stock Island, Florida, as that community's first local broadcast service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted.[1] Key West Communications, Inc. ("Key West"), licensee of Station WOZN-FM, Key West, Florida, filed opposing comments. S-3 filed reply comments.

2. Key West argues that Stock Island is not a community for allotment purposes. It includes a letter from the Planning Department of the City of Key West stating that Stock Island lies within two jurisdictions. North Stock Island, which contains the elementary school, the hospital and the Junior College which S-3 claims is located in Stock Island, is part of the city of Key West. It claims that principal installations on North Stock Island include a community college, an elementary school, a municipal golf course, a County Detention Center, the Health System/Florida Keys Facility (formerly Florida Keys Memorial Hospital) the Key West Convalescent Center, the Monroe County Animal Shelter, the Center of Hope, and the Key West Botanical Garden. South Stock Island, claims Key West, is under the jurisdiction of unincorporated Monroe County and is predominantly residential, with some commercial, industrial and marina activities.

3. Key West claims that Stock Island is not a politically independent community. It submits that the local telephone book reveals virtually no commercial or cultural establishments that identify with "Stock Island." The white pages of the telephone directory identify only four entities whose names begin with "Stock Island." The "Churches" portion of the yellow pages shows one church located on Stock Island, and that is the Key West Baptist Temple. Key West contends that no civic clubs or business organizations are identified with Stock Island. Key West maintains that the integration of Stock Island with the city of Key West is also demonstrated by the fact that the transmitter of Key West Stations WKWF(AM), WAIL(FM), WKRY(FM), and WOZN(FM) are located on Stock Island. All eight stations licensed to Key West provide both transmission and reception service to the residents on Stock Island. Key West notes that the allotment of Channel 248A at the proposed reference coordinates would place the transmitter site in Key West, rather than in Stock Island.[2]

4. In response to Key West's comments S-3 submits a letter from the Chief of Stock Island's Volunteer Fire Department stating that Stock Island is located in unincorporated Monroe County and is an entity with over two thousand residential units. The Chief notes that the Stock Island Volunteer Fire Department has been in existence for thirteen years. The letter also states that there is a Stock Island Businessman's Association, a Stock Island Mobile Home Owners Association, and a Stock Island Neighborhood Improvement Program. The letter claims that there are "numerous commercial and industrial businesses, many of which have moved out of the city of Key West" but retain Key West in their names for business purposes.

5. Based upon the showing submitted by Key West, we do not believe that Stock Island is a "community" for allotment purposes. Stock Island is a Census Designated Place ("CDP") as defined by the U.S. Census. The designation of an area as a CDP raises the presumption that an area is a community for allotment purposes, that presumption is rebuttable. *See, e.g., East Hemet, California, et. al.*, 4 FCC Rcd 7895 (1989); *Hannahs Mill, and Milledgeville, Georgia*, 7 FCC Rcd 3944 (1992). S-3 has stated that Stock Island has a volunteer fire department, a businessman's association and a neighborhood improvement program. However, S-3 has not shown that these organizations are intended to serve the needs of Stock Island, as opposed to the nearby area of Key West. Furthermore, S-3 has failed to identify any other businesses or political, social and commercial organizations which identify themselves with Stock Island. In the past, the Commission has rejected claims of community status where a connection has not been shown between political, social and commercial organizations and the community in question.[3] *See Greina, Marianna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633 (1991) and cases cited therein. Nor has S-3 provided testimony of local residents attesting to Stock Island's community status. *See Memorandum Opinion and Order (Semora, North Carolina)*, 5 FCC Rcd 934 (1990). We believe that the record in this proceeding is insufficient to find that Stock Island is a community for allotment purposes. Therefore, we will not allot Channel 248A to Stock Island, Florida.

[1] Petitioner also filed a motion for extension of time to file reply comments. That motion is moot, given that S-3 timely filed reply comments.

[2] Finally, Key West argues that the radio market in the area is already saturated. S-3 correctly notes in response that this claim is not a relevant factor in an allotment proceeding. *See Suburban Community Policy, The Berwick Doctrine, and the Defacto Reallocation Policy*, 93 FCC 2d 436 (1983).

[3] It appears, for instance, that there is no local government in Stock Island. As we stated in the *Notice of Proposed Rule Making*, Key West is the postal facility for Stock Island.

6. IT IS FURTHER ORDERED, That the request of S-3 Communications Corporation for the allotment of Channel 248A to Stock Island, Florida (RM-7713) IS DENIED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-311

In the Matter of

Amendment of Section 73.202(b), RM-8132
Table of Allotments,
FM Broadcast Stations.
(Iron River, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 11, 1992; Released: January 12, 1993

Comment Date: March 4, 1993
Reply Comment Date: March 19, 1993

By the Chief, Allocations Branch:

1. The Commission considers herein the petition for rule making filed by James V. Lien, Norma G. Lien and Lenard G. Harvey ("petitioner") requesting the allotment of Channel 297C2 to Iron River, Wisconsin, as that community's first local transmission service.[1] Petitioner stated an intention to apply for the channel, if allotted.[2]

2. Petitioner did not submit any information regarding Iron River's status as a community. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. *See, e.g., Oak Grove, FL*, 5 FCC Rcd 3774 (1990); *Hannibal, OH*, 5 FCC Rcd 3315 (1990); and *Statenville, GA*, 5 FCC Rcd 2685 (1990). Although Iron River is attributed with a population of 900 persons by the 1990 U.S. Census, we may find that a population grouping does not constitute a community for allotment purposes where the community may be devoid of the customary factors associated with determining community status, such as a library, schools, shopping centers, churches, a newspaper, and social or civic organizations. *See, e.g., Searles Valley, CA,,* 3 FCC Rcd 5221 (1988); *see also, Naples, FL*, 41 RR 2d 1549 (1977). Therefore, petitioner is requested to submit information regarding Iron River to demonstrate whether it has any commercial establishments, social, economic, cultural or religious organizations, municipal services, or governmental units that identify themselves specifically with that locality.

3. A staff review of the proposal reveals that Channel 297C2 can be allotted to Iron River, Wisconsin, consistent with the minimum distance separation requirements of the Commission's Rules with a site restriction 12.3 kilometers (7.7 miles) east of the community.[3] The site restriction will prevent a short spacing to a proposal to add Channel 296C3 to Moose Lake, Minnesota, in MM Docket 92-220. *See* 7 FCC Rcd 6372 (1992). Since Iron River is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

4. We believe the public interest would be served by proposing the allotment of Channel 297C2 to Iron River, Wisconsin, in the event it is ultimately found to qualify as a community for allotment purposes. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Iron River, as follows:

	Channel No.	
City	Present	Proposed
Iron River, Wisconsin	---	297C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

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[1] Petitioner requested the allotment of Channel 299C2 to Iron River. To avoid a short spacing to a proposal to allot Channel 299A to Proctor, Minnesota, (MM Docket No. 92-249), we have instead proposed Channel 297C2.

Petitioner also requested that it receive a "Pioneer's Preference" for proposing this allotment. The Commission has requested comments on adoption of a "*Finder's Preference*" to be awarded to petitioners that have taken the initiative and burden of introducing a new FM service to a community. *See Reexamination of the Policy Statement on Comparative Broadcast Hearings* (GC Docket No. 92-52), 7 FCC Rcd 2664 (1992). Since that docket has not been terminated, we will not consider petitioner's request for a preference at the application stage.

[2] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3910, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[3] The coordinates for Channel 297C2 at Iron River are 46-35-19 and 91-14-44.

6. Interested parties may file comments on or before **March 4, 1993,** and reply comments on or before **March 19, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, as follows:

James V. Lien
Norma G. Lien
Lenard G. Harvey
P.O. Box 10
Iron River, Wisconsin 54847

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-91

In the Matter of

Amendment of Section 73.202(b),	RM-7108
Table of Allotments,	RM-7514
FM Broadcast Stations.	
(Crestview and Westbay, Florida).	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 16, 1992; Released: January 12, 1993

By the Chief, Policy and Rules Division:

1. Before the Commission is a petition for reconsideration of the *Report and Order* in this proceeding, 7 FCC Rcd 3059 (1992), filed by Crestview Broadcasting Company, Inc. ("Crestview"), licensee of Station WAAZ(FM), Channel 284C2, Crestview, Florida.[1] The *Report and Order* denied Crestview's petition for rule making, which proposed the substitution of Channel 284C1 for Channel 284C2 at Crestview, and modification of its license to specify the higher class channel.[2] No comments were filed in response to Crestview's petition for reconsideration.

2. The *Report and Order* denied Crestview's petition based on a Commission staff engineering analysis which concluded that no site was available for Channel 284C1 at Crestview that complied with channel spacing requirements and was not located on Eglin Air Force Base. We stated that land on a military base does not constitute an available site, as we believe it is doubtful that a party could secure permission to operate a transmitter on a military base.

3. In the petition for reconsideration, Crestview asserted that sites do exist for proposed Channel 284C1 at Crestview that comply with channel spacing restrictions and are not located on Eglin Air Force Base. It supplied detailed maps illustrating available land for a transmitter.[3]

4. Our engineering analysis confirms that Channel 284C1 can be allotted to Crestview at a fully spaced site not located on Eglin Air Force Base.[4] We believe the public interest would be served by substituting Channel 284C1 for Channel 284C2 at Crestview, Florida, and modifying the license of Crestview Broadcasting Company, Inc. to specify operation on the higher class channel. Therefore, pursuant to Section 1.420(g) of our Rules, we will authorize a modification of the petitioner's license for Station WAAZ(FM) to specify operation on Channel 284C1 at Crestview.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 25, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Crestview, Florida	284C1

6. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of Crestview Broadcasting Company, Inc. for Station WAAZ(FM), Crestview, Florida, IS MODIFIED to specify operation on Channel 284C1 in lieu of Channel 284C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Crestview Broadcasting Company, Inc. IS GRANTED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Lawrence A. Walke, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[1] Public notice of the filing of Crestview's petition was given on July 27, 1992, Report No. 1900.

[2] The *Report and Order* also denied a counterproposal filed by Tres Amigos Communications ("TAC"), requesting the allotment of Channel 282A to Westbay, Florida, on the grounds that Westbay is not a community for allotment purposes. TAC did not seek reconsideration of that determination.

[3] The specific site suggested by Crestview in its petition for reconsideration is short-spaced to Station WOAB, Channel 285A, Ozark, Alabama. Since no parties raised objections to Crestview's petition for reconsideration, and no parties will be adversely affected by this action, we conducted our own engineering analysis to locate a site for proposed Channel 284C1 at Crestview.

[4] Channel 284C1 can be allotted to Crestview at coordinates North Latitude 30-26-21 and West Longitude 86-33-43, with a site restriction 35.9 kilometers (22.3 miles) south of the community.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mobile Radio New England — File No. LMK-91260

Request for Rule Waiver

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1992; Released: January 12, 1993

By the Commission:

1. The People of the State of California and the Public Utilities Commission of the State of California ("California") seek review of a Private Radio Bureau action denying California standing to challenge a request by Mobile Radio New England for waiver of Commission Rules.[1] The action was taken by letter of February 13, 1992. Mobile Radio New England proposes construction of a digital Specialized Mobile Radio system in the New England region.[2]

2. In denying California standing, the Bureau cited *American Legal Foundation v. F.C.C.*, 808 F.2d 84 (D.C. Cir. 1987). California asserts that the holding of *Washington Utilities & Transportation Comm. v. F.C.C.*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), is the more appropriate test. We conclude, however, that neither case grants California standing in this proceeding, as both require specific harm to the challenger and its interests. Located on the west coast of the country, California's jurisdiction is far removed geographically from Mobile Radio New England's proposed east coast service area.[3] Given this distance, Mobile Radio New England's operation cannot affect directly operations in the State of California.

3. We conclude in light of the above that the Private Radio Bureau acted correctly when it denied California standing. The application for review accordingly IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Mobile Radio New England, the American Mobile Telecommunications Association, Inc. and the National Association of Business and Educational Radio, Inc. have filed opposing pleadings.

[2] The Bureau granted Mobile Radio New England the requested relief by letter of April 13, 1992, acknowledging in the process the pendency of this application for review.

[3] In this respect, California differs from the National Association of Regulatory Utility Commissioners ("NARUC"), which also opposed Mobile Radio New England's request. As an association of the governmental bodies of the 50 States, District of Columbia, Puerto Rico and the Virgin Islands, engaged in the regulation of carriers and utilities, NARUC includes members directly affected by the proposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mobile Radio New England — File No. LMK-91260

Request for Rule Waiver

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1992; Released: January 12, 1993

By the Commission:

1. The National Association of Regulatory Utility Commissioners ("NARUC") seeks review of Private Radio Bureau actions denying its objections to a waiver request filed by Mobile Radio New England and granting Mobile Radio New England's waiver request and applications.[1] The Bureau's actions were taken by letters of February 13, 1992 and April 13, 1992. Mobile Radio New England wishes to construct a digital Specialized Mobile Radio (SMR) system in the New England region. NARUC challenged its proposal on jurisdictional grounds, arguing that the service would involve "common" rather than "private" carriage under applicable regulatory standards. NARUC also argues that Mobile Radio New England has not justified the requested waiver relief.

2. The essence of NARUC's position is that private and common carriage are distinguished from each other by means of a functional analysis of the particular services offered. If an applicant proposes service that is "functionally equivalent" to common carrier service, then it must be considered a common carrier for regulatory purposes, NARUC argues. NARUC asserts that the Bureau could not evaluate Mobile Radio New England's proposal in this light, because Mobile Radio New England failed to provide the detailed information necessary for the task. Hence the request should have been rejected.

3. We disagree. The private status of land mobile radio services is a "subject we have addressed fully in the past, most recently in our decision, *Fleet Call, Inc.* 6 FCC Rcd 1533, 1537, *recon. dismissed,* 6 FCC Rcd 6989 (1991). There we stated, without qualification, that the relevant test for inclusion in the private land mobile radio service, established by 47 U.S.C. §§ 153(gg), 332(c)(1),[2] is that a licensee not resell interconnected telephone service for profit. So long as a licensee continued to meet this requirement, it remained a private carrier, we added.[3] And, we concluded, should the licensee violate this principle, we would initiate enforcement actions for violations of the terms of the authorization, common carriage being an impermissible use of the frequencies in question, *Fleet Call, Inc., supra,* 6 FCC Rcd at 1537.

4. We have examined the Mobile Radio New England application under the statutory standard discussed above. Like the Bureau, we find no indication that the applicant will fail to satisfy this standard. All of the services proposed -- voice and data wide-area coverage, voice mail, electronic mail, and improved roaming capacity, for example -- can be and already are offered on existing private land mobile radio systems. Interconnected service too is a regular feature of private carrier systems, and NARUC's suggestion that Mobile Radio New England's interconnected service will supplant or displace its traditional dispatch service is speculative. Nothing in the record suggests that Mobile Radio New England has stated that it will resell interconnection to the telephone network for profit. Mobile Radio New England seeks simply to provide established and customary SMR services in a more effective and efficient manner. This desire does not alter its regulatory status.

5. NARUC argues additionally that Mobile Radio New England fails to show "unique circumstances" justifying waiver, citing *WAIT Radio v. FCC,* 418 F.2d 1153 (D.C. Cir. 1969). This is not the case, however. Mobile Radio New England sought relief from three Commission requirements: (1) Section 90.627(b), which governs assignment of additional trunked systems within 40 miles of an existing trunked system; (2) Sections 90.631(e) and (f),

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[1] The application for review is supported by the People of the State of California and the Public Utilities Commission of the State of California. It is opposed by the American Mobile Telecommunications Association, Inc., Dispatch Communications of New England, Inc., Fleet Call, Inc., Mobile Radio New England, and the National Association of Business and Educational Radio, Inc. NARUC has replied to the opposition pleadings and has established good cause for its slight delay in filing.

[2] Sections 3(gg) and 332(c) of the Communications Act were enacted to define clearly a private land mobile radio service, to establish a test for distinguishing between private and common carrier land mobile radio service, and to define the scope of federal and state and local regulation of the land mobile radio services. As indicated by the accompanying legislative history, the primary purpose of this legislation was to end litigation resulting from attempts to impose state entry and rate regulation on private land mobile radio services, which were viewed as deleterious to the development of these services. *Conference Report No. 765,* 97th Cong., 2d Sess., 54 at 55, *reprinted in* 1982 U.S. Code Cong. and Ad. News 2237 (*Conference Report*). Congress also directed this Commission, "in taking actions to manage the spectrum to be made available for use by private land mobile radio services ... [to] improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements and marketplace demands; encourage competition and provide services to the largest feasible number of users." *Conference Report* at 52. The Mobile Radio New England SMR system will enable users within the region to employ advanced mobile radio technology for a diversity of purposes, and our approval and encouragement of such wide-area systems fall clearly within our Congressional mandate to encourage the larger and more effective use of radio in the public interest.

[3] 6 FCC Rcd at 1537. NARUC's complaint that the Commission could allow any current cellular carrier to provide interconnected service virtually identical to its current offerings on a private carrier basis by merely changing its accounting regulations is specious. SMR systems may only serve eligible users, and cellular carriers are legally barred from the provision of dispatch service, which is one of the primary offerings of the SMR industry. More fundamentally, the legislative history's reference in a footnote to this Commission's decisions in the *Resale and Shared Use* proceedings, 60 FCC 2d (1976) (subsequent history omitted) demonstrates that Congress was well aware of the sometimes subtle distinctions between resale and similar, though distinct, activities such as sharing.

which establish a one-year construction requirement for trunked systems; and (3) Section 90.621(b), which imposes a 70-mile separation requirement between co-channel SMR stations.

6. With respect to Section 90.627(b), Mobile Radio New England asks to use aggregate system loading to comply with this provision. Where a licensee makes the requisite showing, as Mobile Radio New England has done in this proceeding, waiver is unnecessary.[4] In connection with our spacing requirements, the Commission recently amended the rules to provide for spacing between stations of less than 70 miles based on a table of antenna heights and power capacity.[5] In such situations, waiver would be unnecessary. The Commission indicated, however, that applicants whose facilities were not permissible under the table could still seek a short-spacing waiver if they could demonstrate that the 30 dBu contour of one station does not overlap the 40 dBu service contour of the other station, as this is the degree of interference protection that the rule is designed to achieve.[6] Such waiver requests must include: (1) the identity of all co-channel stations; (2) diagrams showing the 30 dBu contours of the proposed station and the 40 dBu contours of existing stations; (3) specifications of the interference criteria and system parameters used in the interference study; and (4) a description of the propagation models, any engineering assumptions made and any special terrain features considered in the interference impact computation.[7] In addition, waiver applicants are required to serve their applications on all co-channel licensees within the particular area.

7. Mobile Radio New England has provided all of this required information, has served all relevant licensees, and has demonstrated that the stations are located in an area where no frequencies are available for assignment and that the 30 dBu contour of the proposed facilities will not overlap the 40 dBu contour of the existing facilities.[8] Thus, Mobile Radio New England has met the applicable short-spacing waiver standard.[9]

8. Turning to the request for waiver of our one-year construction requirement, Mobile Radio New England has offered specific demonstrations that its system will increase spectrum efficiency, that the novelty and complexity of construction make a one-year construction deadline inappropriate and that the extent of current loading eliminates any risk of spectrum hoarding.[10] These demonstrations satisfy the requirements for waiver of 47 C.F.R. §90.151 that "unique circumstances are involved and ... there is no reasonable alternative solution within existing rules." *See also Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC, supra*, 418 F.2d at 1157. Accordingly, we conclude that Mobile Radio New England has justified waiver of our one-year construction requirement under well-established waiver standards. *See, e.g., Fleet Call, Inc., supra*, 6 FCC Rcd at 1536; *American Mobile Data Communications, Inc.*, 4 FCC Rcd 3802, 3805 (1989); *Advanced Train Control System*, 3 FCC Rcd 427, 428 (1988); *IBM Research and Development, Inc.*, 53 RR 2d 675, 677 (1983).

9. In summary, we conclude (1) that the statutory test for determining Mobile Radio New England's regulatory status is whether it proposes to resell interconnected telephone service for profit, (2) that the record contains sufficient information for an assessment under this test, (3) that nothing before us suggests that Mobile Radio New England will not meet the statutory requirement, and (4) that waiver of the Section 90.621 separation requirement and Section 90.631 construction deadline is appropriate. Accordingly, the applications for review filed by the National Association of Regulatory Utility Commissioners on April 10, 1992, and May 1, 1992, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[4] Fleet Call, Inc., *supra*, 6 FCC Rcd at 1535-1536.
[5] *See* Report and Order, PR Docket No. 90-34, 6 FCC Rcd 4929, 4931 (1991).
[6] *Id.* at 4929, 4931.
[7] *Id.* at 4936 n.44.
[8] NARUC does not question the validity of either Mobile Radio New England's aggregate loading showing or its "short-spacing" showing.
[9] Given that the specific short-spacing waiver standard is met, we need not evaluate the short-spacing waivers under the more general standard contained in Section 90.151 of our Rules.
[10] Request for Rule Waiver of Mobile Radio New England at 13-16, 17-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOBILCOM PITTSBURG, INC. File No. LMK-92049

For Renewal of License

MEMORANDUM OPINION AND ORDER

Adopted: December 24, 1992; Released: January 12, 1993

By the Commission:

1. Mobilcom Pittsburg, Inc. (Mobilcom) seeks review of a Private Radio Bureau action granting renewal of only two of five channels licensed to Specialized Mobile Radio Service (SMRS) station WNGC-453 in the Kansas City, Missouri, area. The remaining three channels were recovered for reassignment elsewhere in the area. Mobilcom asserts that it lacked notice of the standards governing its license and of the consequences of failure to comply with them. It argues further that waiver is warranted if other relief is denied.

2. Mobilcom acquired the license for station WNGC-453 by assignment. The license had been issued originally on September 15, 1986, and it expired on September 15, 1991. Mobilcom's assignment application was granted on March 20, 1991. This action did not change the original license terms and Mobilcom's license clearly indicated a September 15, 1991 expiration date.

3. Section 90.631(b) of the Commission's Rules, 47 C.F.R. § 90.631(b), provides in pertinent part that SMRS systems must be loaded to a minimum of 70 mobiles per authorized channel within five years of the initial license grant. If at the end of five years the station is not loaded to the prescribed level and all channels in the licensee's category are assigned in the system's geographic area, then authorization for all channels not loaded to 100 mobiles cancels automatically.

4. According to Commission records, 140 mobiles and controls were authorized to operate on station WNGC-453 on September 15, 1991. Commission records showed also that Kansas City was a waiting list area on that date. Under these circumstances, the Bureau by letter of January 29, 1992 recovered three of the five channels assigned, citing Section 90.631(b) in support. Mobilcom sought reconsideration, which was denied by letter of March 11, 1992. It now seeks review of this action.

5. We find no error in the Bureau's action. Mobilcom asserts that it reasonably believed Kansas City to be a "rural" (*i.e.* non-wait listed) area when it acquired its license. It argues that Commission procedures failed to afford it lawful notice of a contrary status, thereby denying it reasonable opportunity to comply with applicable standards.[1] Mobilcom misunderstands the nature of our requirements, however. Under Section 90.631(b), Mobilcom was required to load its system to a minimum of 70 mobiles per authorized channel within five years of the initial license grant. This obligation is clearly stated in our Rules, and Mobilcom does not, and cannot, claim to have lacked notice of it. Nonetheless, Mobilcom did not meet the loading requirement.

6. Having failed to load its system, Mobilcom brought to bear the question of consequences. Section 90.631(b) provides in pertinent part for the automatic cancellation after five years of authorizations for channels not loaded to 100 mobiles in geographic areas where all channels in the licensee's category have been assigned and waiting lists have been established. This policy reflects our conviction that spectrum should not lie fallow when there are applicants ready and willing to use it.[2] Our channel recovery program therefore focuses on conditions existing at the time a license expires; it is then, and only then, that we can determine whether others wish to use channels that the current licensee has left idle.[3] Contrary to Mobilcom's position, the status of its geographic area was determined at license expiration, not at license grant.[4]

7. Further, Mobilcom was afforded all of the time permitted by our rules to load its system. The licensee cites in this regard Section 90.631(d) of our Rules, which makes special provision for certain licensees. Under this section, if a waiting list is established in a rural area, licensees who acquired additional channels without first meeting our loading requirements[5] are given either one year from the date the area first appears on a waiting list, or until the end of their license term, to load their systems. Mobilcom is not such a licensee, however. Rather than expanding an existing system in a rural area, it acquired a single new system in an established waiting list area. Hence, the equities favoring relief to licensees in changed circumstances do not apply to Mobilcom because Section 90.631(d) is inapplicable.

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[1] Under long-standing Commission policy, waiting lists are issued by periodic Public Notice. *See, e.g.*, Public Notice No. 3570, Private Radio Bureau Clarifies Processing Procedures for Trunked Radio Systems at 800 MHz, released April 4, 1986. These Public Notices are a service to interested parties seeking a general idea as to the status of particular areas. Channel recovery actions are not based on information contained in published Public Notices, however, but on conditions existing on the precise date in question. *See* paragraph 6, *infra*.

[2] Memorandum Opinion and Order, PR Docket No. 79-191, 95 FCC 2d 477, 482-486 (1983); Second Report and Order, PR Docket No. 79-191, 90 FCC 2d 1281, 1314 (1982).

[3] Because licensees cannot always anticipate the status of their geographic areas, they fail to load fully at their own peril. Or, stated otherwise, licensees avoid the prospect of automatic cancellation only by approaching their expiration date with systems loaded to the levels required by our rules.

[4] There is no question that Kansas City was a wait listed area on the day that Mobilcom's license expired.

[5] Licensees may not as a rule expand their SMRS systems unless all authorized channels are loaded to a level of 70 mobiles per channel. An exception is made in Section 90.631(d) of our Rules for licensees in rural areas, who may increase their system capacity by five more channels than they have constructed without meeting loading requirements.

8. Mobilcom's request for waiver relief rests upon a claim that its system is now fully loaded, placing it in a preferred position to obtain available channels in its market.[6] There is, Mobilcom argues, no point in recovering its channels simply to reassign them back to the same licensee. Mobilcom is not entitled to an immediate reassignment, however. The licensee was obligated to load its system fully within five years of the original grant date. It cannot now seek a *de facto* extension of this deadline by appealing our channel recovery action and using the time involved in the appellate process to achieve compliance with our rules. To permit such an approach would compromise both the orderly conduct of our business and the integrity of our channel recovery program.[7]

9. We conclude, in light of the above, that the channels assigned station WNGC-453 were properly recovered for failure to meet loading requirements. Accordingly, IT IS ORDERED that the application for review filed by Mobilcom Pittsburg, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[6] Under Section 90.611(d) of our Rules, 47 C.F.R. § 90.611(d), existing licensees with fully loaded systems have priority over new applicants when additional frequencies become available for assignment, based generally on a chronological ranking of applications received for additional channels in the area.

[7] Mobilcom's decisions to appeal the channel recovery action and to continue loading its system after the license expiration date were entirely its own. Hence, it must assume all responsibility for the consequences of these actions. These consequences include the operation of our six-month prohibition on the assignment of additional channels to expand systems that have lost channels for failure to meet loading requirements, see Section 90.631(b) of our Rules. In seeking review of our original channel recovery action, Mobilcom postponed the beginning of this six month period from the effective date of the recovery action to the effective date of our denial of its application for review.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 15, 1992

Released: January 13, 1993

Mr. John C. Litchfield
Assistant Vice President
Tariffs & Costs
Ameritech
Floor 22
10 South Wacker Dr.
Chicago, IL 60606

Dear Mr. Litchfield:

In your letter of April 16, 1992, you request approval of the "delivery of the existing Signaling System 7 (SS7) Initial Address Message (IAM)" as a basic service element (BSE). We have concluded that your proposed treatment of the IAM as a BSE is reasonable in this case.

Sincerely,

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELAMARKETING
INVESTMENTS LTD.,
Complainant

v. File No. E-91-121

LINCOLN TELEPHONE &
TELEGRAPH COMPANY,
Defendant

ORDER

Adopted: January 6, 1993; Released: January 12, 1993

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 24, 1991, Telamarketing Investments Ltd., (Telamarketing) filed the above-captioned complaint against Lincoln Telephone and Telegraph Company (Lincoln) seeking damages resulting from Lincoln's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On December 23, 1992, Telamarketing and Lincoln filed a joint motion to dismiss the complaint stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' joint motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Stephen Communications, Inc. — File No. 13606-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Lubbock, Texas

ORDER ON RECONSIDERATION

Adopted: December 17, 1992; Released: January 12, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Stephen Communications, Inc. (Stephen) requests reinstatement of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Lubbock, Texas, after its dismissal by the Domestic Facilities Division (Division) on delegated authority.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of this application pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Stephen was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Stephen was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In this deficiency letter, Stephen was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Stephen provided some, but not all, of the information necessary to complete processing of its application. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d), the Division dismissed Stephen's application for failure to comply completely in a timely manner with the Division's request for information. With its reinstatement request, Stephen resubmitted a partial response to the Division's previous request for information, together with an affidavit stating that this information had been submitted prior to dismissal.

4. *Discussion.* As of the date of the Division's dismissal action, Stephen still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Stephen had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site, as required by Section 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. In addition, Stephen failed to submit the requested current financial qualification data prior to dismissal.[4] *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). Instead, Stephen announced it would rely on a bank letter it submitted with its initial application. However, at that time, Section 21.17(e) required that a bank financing letter must include a statement committing the bank to providing the financing. Stephen's letter lacks such a commitment because financing is contingent upon Stephen meeting credit criteria at an unspecified future date, with the credit criteria to be determined in the future. Thus, Stephen's bank letter submission failed to comply with Section 21.17 requirements and the Division's specific request.

6. Stephen also failed to comply with the request to submit a Section 21.902(i) ITFS interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within

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[1] The deficiencies cited were the absence of: (1) a public interest statement, pursuant to 21.13(a)(4); (2) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (3) a Federal Aviation Administration (FAA) study, as required by 47 C.F.R. Secs. 17.4 and 21.15(d); (4) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (5) the analysis of interference avoidance, required by 47 C.F.R. Sec. 21.901(d)(7); (6) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (7) the required tariff exhibit, pursuant to item 29 of FCC Form 435 and 47 C.F.R. Sec. 21.13(a)(3); (8) required information on station maintenance and emergency repairs, pursuant to 47 C.F.R. Sec. 21.15(e) and FCC Form 435 item 18; (9) answers to each of the questions on pages 5, 6 and 7 of the application, FCC Form 435; and (10) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Even if Stephen was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

[4] Even if Stephen were not required to comply with the requirements of Section 21.17, Stephen was required, pursuant to Section 21.13(c), to submit in a timely manner the required financial demonstration after the Division directed it to do so.

50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Stephen failed to do so. *See Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991). Also, Stephen failed to submit the requested FAA study for compliance with FCC and FAA regulations concerning avoidance of air navigation hazards, pursuant to Sections 17.4 and 21.15(d).

7. Stephen had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for more than 21 months substantially impeded the expeditious offering of MMDS at Lubbock. Also, Stephen's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *See By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Stephen had not provided the required current financial data, the required ITFS interference analysis, the required FAA study, or the required lease or lease option agreement. The Division was not in a position, therefore, to complete evaluation of Stephen's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

8. *Conclusion.* Having carefully considered the applicant's reinstatement request, we find that dismissal of this application for failure to comply with the Division's request for information was proper and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the request for reinstatement filed by Stephen Communications, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. See 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Microwave Video Services, Inc. — File No. 8957-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on the E-group channels at Greensboro, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: December 17, 1992; Released: January 12, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of Microwave Video Services, Inc. (Microwave) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Greensboro, North Carolina was selected for qualification review as the result of a Commission lottery. The Committee for Fair MDS Lotteries (Committee) and MTD Enterprises (MTD) filed post-lottery Petitions to Deny, challenging the application. Microwave filed no responsive pleading.

2. *The Committee's Petition to Deny.* In its Petition, the Committee alleges that Microwave, together with fifteen other MMDS applicants, engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names.[1] All sixteen of these applicants filed applications for Greensboro. The Committee contends that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the preparation of the applications under the direction and at the expense of Merrill Communications, and the similarities in technical and other information among the applications, and the Letter of Understanding between Microwave and Merrill Communications, should lead the Commission to conclude that Microwave failed to disclose the identity of the real-party-in-interest to its application in violation of 47 C.F.R. Sec. 21.13(a). In addition, the Committee contends that multiple applications were filed in violation of 47 C.F.R. Sec. 21.901(d)(2), also known as the one-to-a-market rule. The Committee also contends that Microwave failed to disclose its affiliation or relationship to its intended or likely subscriber, Merrill Communications, in violation of 47 C.F.R. Sec. 21.900.

3. *Discussion.* The allegations by the Committee concerning violations of the real-party-in-interest and the one-to-a-market rules are not unique to this particular Microwave application. These allegations, as applied to Microwave, were considered and rejected by the Commission in *VCI*. For the reasons provided in *VCI*, we find the Committee's unsubstantiated evidence insufficient to establish the existence of real-party-in-interest and one-to-a-market rule violations.[2]

4. The Committee also alleges that Microwave violated the non-affiliation provision of Section 21.900 because it failed to submit a statement in its application disclosing the affiliation or relationship between Microwave and Merrill Communications, its intended or likely subscriber.[3] At the time Microwave's MMDS application was filed, Philip Merrill was the President of Microwave and the Vice President of Merrill Communications. Microwave failed to disclose that there was this business affiliation or relationship with Merrill Communications, thereby violating Section 21.900. We determine that a condition would be imposed on any MMDS authorization for Greensboro issued to Microwave, requiring that Microwave could not provide service to Bruce Merrill, Merrill Communications, or any entity in which Bruce Merrill is affiliated.

5. *MTD's Petition to Deny.* MTD is incorrect in asserting that MMDS applications are required to meet a "letter perfect" standard. *See* 47 C.F.R. Secs. 21.13, 21.20, 21.26 and 21.32. With regard to Microwave's alleged financial deficiencies, after a revision of Section 21.17, financial certifications have replaced financial demonstrations. Microwave filed post-lottery amendments to cure its failure to submit with its initial application, a public interest statement, an emergency repair procedure and maintenance plan, and a proposed tariff. MTD is incorrect in stating that no Qualification Report, FCC Form 430, was filed by Microwave. Section 21.901(d)(1) did not require Microwave to submit an ITFS interference analysis with its initial application. Another provision MTD argues that Microwave violated, Section 21.902(d), defines an MDS station's protected service area, but does not itself require that any specific document be filed.

6. MTD is correct in asserting that Microwave failed to comply with 47 C.F.R. Secs. 21.901(d)(7) and 21.902(a), together with "paragraph 109 of the Commission's *Report and Order* (80-112)." At the time Microwave filed its Greensboro application, it had notice that all MMDS ap-

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[1] The Committee incorporated by reference the pleadings it filed in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987) (hereinafter cited as *VCI)* and against Microwave's Greenville application.

[2] *See, e.g., Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1536, 1573 (D.C.Cir. 1988)(hereinafter cited as *Astroline); Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont)*; *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394, 397 (D.C.Cir. 1985); *see also, Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989); *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

[3] The terms "affiliation or relationship" have been defined for purposes of Section 21.900 as any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, except the carrier-user relationship. *Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 618 (1974).

plicants, at the time of filing, must submit a specific technical interference protection showing specifying the techniques the applicant would employ to avoid interference to cochannel and adjacent channel stations. In the *MMDS Allocation Order*, the Commission described clearly the kind of information applicants must submit in order to justify their technical competence in resolving cochannel or adjacent channel interference, pursuant to Section 21.901(d)(7). *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations with regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203, 1247, 1264 (1983)(hereinafter cited as *MMDS Allocation Order)*. This interference protection showing is a significant requirement. *Id.* at 1246, 1247, 1264, 1265; *Marylan J. Benson*, 7 FCC Rcd 4668 (Dom. Fac.Div. 1992)(hereinafter cited as *Benson)*. *See* 47 C.F.R. Sec. 21.902(c).

7. Microwave's application lacked any reference to minimizing interference to the MMDS station on the F-group channels in Greensboro, or MMDS stations on the E-group channels in nearby areas. Thus, Microwave failed to file with its MMDS application the interference showing required by Section 21.901(d)(7). We find that Microwave violated Section 21.901(d)(7). The consequences of failing to provide this demonstration was unequivocally stated in the *MMDS Allocation Order*, 94 FCC 2d at 1264. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk...." *Ranger v. FCC*, 294 F.2d 240, 242 (1961).

8. Each MMDS applicant is required to demonstrate its technical qualifications to be an MMDS licensee, pursuant to 47 C.F.R. Secs. 21.13 and 21.900. *Benson*, 7 FCC Rcd at 4669. Microwave's failure to submit the necessary interference protection showing required by Section 21.901(d)(7) renders the application not grantable pursuant to 47 C.F.R. Sec. 21.32. *Id.* The Commission is unable to make the findings required by 47 C.F.R. Sec. 21.32, namely that Microwave's application for Greensboro conforms to Commission rules and requirements, demonstrates that Microwave is technically qualified, demonstrates that a grant of its application would not cause harmful electrical interference to an authorized station, and demonstrates that a grant of the application would serve the public interest.[4]

9. *Conclusion and Ordering Clause*. Having carefully considered all the pleadings and the evidence submitted, we find that the allegations raised by the Committee, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petition to Deny filed by The Committee for Fair MDS Lotteries IS HEREBY DENIED. IT IS FURTHER ORDERED that the Petition to Deny filed by MTD Enterprises IS GRANTED and Microwave's above-referenced Greensboro MMDS application IS DENIED.[5] This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4, 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] MTD also alleges that Microwave failed to file a certification that it holds no mass media interests, pursuant to 47 C.F.R. Secs. 1.1621 - 1.623. Microwave's application benefited in its lottery by receiving a preference for having no mass media interests. However, resolution of this issue is not dispositive due to our grant of the MTD petition. Therefore, the preference issue has not been separately discussed.

[5] Due to the disposition of Microwave's application, it is unnecessary to require the applicant to file a financial certification or to impose a condition on its Greensboro authorization for its violation of Section 21.900.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-1

In the Matter of

Amendment of Parts 2 and 15 to
Prohibit Marketing of Radio Scanners
Capable of Intercepting Cellular
Telephone Conversations

NOTICE OF PROPOSED RULE MAKING

Adopted: January 4, 1993; Released: January 13, 1993

Comment Date: February 22, 1993
Reply Date: March 8, 1993

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to amend Parts 2 and 15 of its rules to prohibit the manufacture or importation of radio scanners capable of receiving frequencies allocated to the Domestic Public Cellular Radio Telecommunications Service.[1] This action is in response to the Telephone Disclosure and Dispute Resolution Act (Act), Pub. L. 102-556. The proposed rules are intended to increase the privacy protection of cellular telephone users without unduly restricting legitimate uses of scanners.

BACKGROUND

2. The Domestic Public Cellular Radio Telecommunications Service ("Cellular Radio Service") provides telephone service to mobile customers. Cellular telephones use frequencies in the bands 824-849 MHz and 869-894 MHz to connect their users to other cellular system users and to the Public Switched Telephone Network.

3. As defined within our rules scanning receivers, or "scanners," are radio receivers that automatically switch between four or more frequencies anywhere within the 30-960 MHz band.[2] In order to control their potential to cause harmful interference to authorized radio communications, the rules require that scanners receive an equipment authorization (certification) from the Commission prior to marketing.[3] The Electronic Communications Privacy Act of 1986, Pub. L. 99-508, in part, made it illegal to intentionally intercept cellular communications or to manufacture equipment primarily useful for the surreptitious interception of cellular communications.[4] However, the Commission was not given specific authority to deny equipment authorization to scanners that receive cellular frequencies. As a result, scanners capable of receiving cellular frequencies are routinely authorized by the Commission.

4. In the past five years, 22 different models of scanning receivers capable of receiving cellular telephone transmissions have been issued grants of equipment authorization. During this same period, ten other models capable of tuning frequencies between 806 and 900 MHz *except* for the cellular bands have also been authorized. Several publications currently on the market describe relatively simple modifications that users can make to many of the latter scanning receivers to enable that equipment to receive cellular telephone transmissions.

5. On October 28, 1992, the President signed the Telephone Disclosure and Dispute Resolution Act into law. Section 403 of this Act amends the Communications Act of 1934 (47 U.S.C. Section 302) by requiring that by April 26, 1993 (180 days after enactment of the Act), the Commission prescribe and make effective regulations denying equipment authorization for any scanning receiver that is capable of:

- receiving transmissions in the frequencies allocated to the domestic cellular radio service,
- readily being altered by the user to receive transmissions in such frequencies, or
- being equipped with decoders that convert digital cellular transmissions to analog voice audio.

Further, new Section 302(d)(2) provides that, beginning one year after the effective date of the regulations adopted pursuant to paragraph (d)(1), no receiver having such capabilities shall be manufactured in the United States or imported for use in the United States.[5]

DISCUSSION

6. In accordance with Section 403 of the Act, we are proposing to deny equipment authorization to scanning receivers that tune frequencies used by cellular telephones. We are also proposing to require applicants for the authorization of scanning receivers to include in their applications a statement declaring that their receivers cannot be tuned to receive cellular telephone transmissions.

7. Developing regulations that deny equipment authorization to scanning receivers capable of "readily being altered by the user" to receive cellular telephone transmissions is somewhat more complicated. Most of the alterations that users can readily accomplish are possible because the microprocessor chips that control the tuning circuitry of many scanning receivers are designed to receive cellular telephone transmissions. Many scanners are marketed worldwide, and some countries do not prohibit scanning of the 824-849 MHz and 869-894 MHz bands.

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[1] The Commission's regulations regarding the Domestic Public Cellular Radio Telecommunications Service are set forth in Part 22 of the FCC rules, 47 CFR Part 22, Subpart K.

[2] *See* 47 CFR Section 15.3(v).

[3] *See* 47 CFR Sections 15.101(a) and 2.1031 *et seq.*

[4] *See* 18 U.S.C. Sec. 2511, 2512.

[5] *See* Telephone Disclosure and Dispute Resolution Act, *supra.*, Section 403. Section 403 also requires that the Commission report to Congress, by June 1, 1993, on available security features for both analog and digital cellular radio signals. This reporting requirement will be dealt with separately from this proceeding.

Prior to marketing one of these receivers in the United States, the manufacturer can choose to defeat the ability to receive cellular transmissions by adding a simple component such as a resistor, diode or jumper wire to the receiver's printed circuit board. In order to restore cellular coverage, the user simply has to remove the component that was added to block out this coverage. It is clear from the legislative history of the Telephone Disclosure and Dispute Resolution Act that Congress intended the Commission to craft rules that preclude such simple modifications.[6]

8. We are proposing to require that scanning receivers be incapable of being readily altered by the user to operate within the cellular bands. To assist us in determining whether a scanner complies with this requirement, we propose to require applicants for scanning receiver equipment authorization to include in their applications a statement pledging that their receivers cannot be readily altered to receive cellular telephone transmissions. We also propose to prohibit the authorization of any scanning receiver for which cellular coverage can be restored by cutting, or adding, a simple component such as a resistor, diode or jumper wire, or for which cellular coverage can be restored by unplugging a semiconductor chip and/or plugging in a new one. We solicit comment on this proposed reporting requirement and on the definition of "readily altered."[7] We also seek comment on whether additional information, such as why the receiver cannot be readily altered, should be required.

9. In compliance with the requirements of the Telephone Disclosure and Dispute Resolution Act, we propose to deny equipment authorization to any scanning receiver that can be equipped with decoders that convert digital cellular transmissions to analog voice audio. We invite comment on the potential impact of this requirement on existing models of scanning receivers.

10. There currently are a number of frequency converters on the market that convert cellular radio transmissions in the 800 MHz band to lower frequencies. These devices can be used in conjunction with scanners that receive frequencies below 800 MHz to enable the reception of cellular telephone transmissions. To allow such converters to be marketed would be inconsistent with the intent of the Act. Accordingly, we are proposing to deny equipment authorization to converters that tune, or can be readily altered by the user to tune, cellular telephone frequencies.[8] We will require that applicants for FCC equipment authorization of frequency converters used with scanners include in their applications a statement pledging that the converters cannot be easily altered to enable a scanner to receive cellular transmissions. We seek comment on whether this statement should also include evidence indicating why the converter cannot be easily modified.

11. Under the rules we are proposing, if the Commission discovers evidence that a scanning receiver, or a frequency converter used with a scanning receiver, can be readily altered to tune cellular frequencies after it has received a grant of equipment authorization, the Commission will consider whether the grant should be revoked, and whether the manufacturer(s), importer(s), wholesaler(s) and retailer(s) of the receiver should be subject to enforcement action for violating Section 302 of the Communications Act of 1934, as amended, and the Commission's rules.[9]

12. The proposed rules are shown in Appendix A. The relevant text of the Telephone Disclosure and Dispute Resolution Act is shown in Appendix B.

PROCEDURAL MATTERS

13. *Initial Regulatory Flexibility Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, the Commission's initial analysis is as follows:

I. *Reason for Action:* The Telephone Disclosure and Dispute Resolution Act requires this action to be taken.

II. *Objective:* The objective of the proposed rules is to help ensure the privacy of participants in cellular telephone conversations by significantly reducing the availability of scanning receivers that can be used to eavesdrop on these conversations.

III. *Legal Basis:* Action is proposed in accordance with Sections 4(i), 302(d), 303(f), 303(g) and 303(r) of the Communications Act of 1934, as amended, and Pub. L. 102-556.

IV. *Description, potential impact and number of small entities affected:* The proposed changes in the regulations would likely affect fewer than 50 small entities. Manufacturers of scanning receivers, or frequency converters used with scanning receivers, that can receive, or be easily altered to receive, cellular telephone transmissions would be required to modify their designs. These manufacturers would also be required to provide written statements indicating that their devices cannot be easily altered when they submit applications for equipment authorization. This would result in some expense to manufacturers.

V. *Any significant alternative minimizing the impact on small entities and consistent with the stated objectives:* None.

14. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR Sections 1.415 and 1.419, interested parties may file comments on or before **February 22, 1993,** and

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[6] *See Congressional Record - Senate,* October 9, 1992, at S17121.

[7] One obvious way to address these requirements is to require scanning receiver manufacturers to design microprocessor chips that are not capable of tuning cellular transmissions in the first place. This solution could increase the cost, at least in the short term, of bringing new scanning receivers to market because microprocessor chips would have to be redesigned. We recognize that this solution might not be effective if replacement microprocessors were on the market that could be easily switched with the original microprocessor in order to restore cellular coverage. We seek comment on whether we should adopt regulations that require that no semiconductors in scanners be installed in sockets or that prohibit certain microprocessor models.

[8] These converters are receivers subject to authorization under the notification procedure. *See* 47 CFR Section 15.101. We are not proposing to subject cable television converters, or similar devices that may be capable of tuning to cellular frequencies, to these requirements.

[9] Sanctions may include administrative fines of up to $10,000 for each violation or for each day of a continuing violation up to a total of $75,000. They may also include federal court civil seizure and forfeiture of the non-compliant equipment inventory; and/or issuance of a federal court injunction against further violations; and/or criminal penalties, upon conviction, of a criminal fine of up to $100,000 for individuals, $200,000 for organizations, and/or imprisonment, for individuals, for up to one year or more. *See* 47 U.S.C. 501 and 503; and 18 U.S.C. 2512 and 3571.

reply comments on or before **March 8, 1993.** These abbreviated comment periods are necessary to comply with the requirements in the Telephone Disclosure and Dispute Resolution Act, and are unlikely to be extended. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

15. *Ex Parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 CFR Sections 1.1202, 1.1203 and 1.1206(a).

16. For further information on this proceeding contact David Wilson, Technical Standards Branch, Office of Engineering and Technology, 202-653-8138.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 2 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 2--FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 154(i), 302, 303, 303(r) and 307.

2. Section 2.975 is amended by adding a new paragraph (a)(8) to read as follows:

Section 2.975 Application for notification.

(a) * * *

(8) Applications for the notification of receivers contained in frequency converters used with scanning receivers shall be accompanied by an exhibit indicating compliance with the provisions of Section 15.121 of this Chapter.

* * * * *

3. Section 2.1033 is amended by adding a new paragraph (b)(12) to read as follows:

Section 2.1033 Application for certification.

* * * * *

(b) * * *

(12) Applications for the certification of scanning receivers under Part 15 shall be accompanied by an exhibit indicating compliance with the provisions of Section 15.121 of this Chapter.

* * * * *

Part 15 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 15--RADIO FREQUENCY DEVICES

1. The authority citation for Part 15 continues to read as follows:

AUTHORITY: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303 and 307.

2. Section 15.37 is amended by revising paragraph (b), and adding a new paragraph (f), to read as follows:

Section 15.37 Transition provisions for compliance with the rules.

* * * * *

(b) * * * In addition, receivers are subject to the provisions in paragraph (f) of this Section.

* * * * *

(f) The manufacture or importation of scanning receivers, and frequency converters used with scanning receivers, that do not comply with the provisions of Section 15.121 of this Part shall cease on or before April 26, 1994. Effective April 26, 1993, the Commission will not accept applications for equipment authorization for receivers that do not comply with the provisions of Section 15.121 of this Part. This paragraph does not prohibit the sale or use of authorized receivers manufactured in the United States, or imported into the United States, prior to April 26, 1994.

3. Section 15.121 is added to read as follows:

Section 15.121 Scanning receivers and frequency converters used with scanning receivers.

Scanning receivers, and frequency converters used with scanning receivers, must be incapable of operating (tuning), or readily being altered by the user to operate, within the frequency bands allocated to the Domestic Public Cellular Radio Telecommunications Service. Receivers capable of "readily being altered by the user" include, but are not limited to, those for which the ability to receive transmissions in the restricted bands can be added by clipping the leads of, or installing, a diode, resistor and/or jumper wire; or replacing a plug-in semiconductor chip. Scanning receivers, and frequency converters used with scanning receivers, must also be incapable of converting digital cellular transmissions to analog voice audio.

APPENDIX B

Section 403 of the Telephone Disclosure and Dispute Resolution Act (Pub. L. 102-556, enacted October 28, 1992)

Sec. 403. INTERCEPTION OF CELLULAR TELECOMMUNICATIONS

(a) AMENDMENT. -- Section 302 of the Communications Act of 1934 (47 U.S.C. 302) is amended by adding at the end the following new subsection:

"(d)(1) Within 180 days after the date of enactment of this subsection, the Commission shall prescribe and make effective regulations denying equipment authorization (under part 15 of title 47, Code of Federal Regulations, or any other part of that title) for any scanning receiver that is capable of --

"(A) receiving transmissions in the frequencies allocated to the domestic cellular radio telecommunications service,

"(B) readily being altered by the user to receive transmissions in such frequencies, or

"(C) being equipped with decoders that convert digital cellular transmissions to analog voice audio.

"(2) Beginning 1 year after the effective date of the regulations adopted pursuant to paragraph (1), no receiver having the capabilities described in subparagraph (A), (B), or (C) or paragraph (1), as such capabilities are defined in such regulations, shall be manufactured in the United States or imported for use in the United States."

(b) REPORT TO CONGRESS. -- The Commission shall report to Congress no later than June 1, 1993, on available security features for both analog and digital radio signals. This report shall include a study of security technologies currently available as well as those in development. The study shall assess the capabilities of such technologies, level of security afforded, and cost, with wide-spread deployment of such technologies.

(c) EFFECT ON OTHER LAWS. -- This section shall not affect section 2512(2) of title 18, United States Code.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-312

In the Matter of

Amendment of Section 73.202(b), RM-8137
Table of Allotments,
FM Broadcast Stations.
(Walhalla, North Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 17, 1992; Released: January 13, 1993

Comment Date: March 5, 1993
Reply Comment Date: March 22, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Roger A. and Kathryn Ann Anderson ("petitioners") requesting the allotment of Channel 294C2 to Walhalla, North Dakota, as the community's first local FM service.[1] Petitioners state that they will apply for the channel, if allotted.[2]

2. We believe the public interest would be served by proposing the allotment of Channel 294C2 to Walhalla since an interest has been expressed in providing the community with its first local FM service. Channel 294C2 can be allotted to Walhalla in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.1 kilometers (16.3 miles) west to avoid short-spacings to unoccupied and unapplied-for Channels 292C and 296C, Winnipeg, Manitoba, and Channel 294C, Kenora, Ontario, Canada.[3] Canadian concurrence in the allotment at Walhalla is required since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Walhalla, North Dakota	--	294C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 5, 1993,** and reply comments on or before **March 22, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Roger A. Anderson
Kathryn Ann Anderson
1113 Sunflower Lane, Route #1
Hazen, North Dakota 58545
(Petitioners)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be

[1] We note that the petition was signed, as required by the Commission's rules. However, petitioners failed to include an affidavit verifying that the statements contained in their petition were accurate to the best of their knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* 5 FCC Rcd 3910, n.41 (1990). Petitioners are requested to rectify this omission in their comments.

[2] Petitioners request that they be awarded a "pioneer's preference" should Channel 294C2 be allotted to Walhalla. However, while a proposal is before the Commission to provide for a "finder's preference" in FM and TV allotment proceedings, the Commission has not taken any final action on the request. *See Reexamination of the Policy Statement on Comparative Broadcast Hearings* (GC Docket No. 92-52), 7 FCC Rcd 2664 (1992).

[3] The coordinates for Channel 294C2 at Walhalla, North Dakota, are North Latitude 48-55-23 and West Longitude 98-03-11.

served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-313

In the Matter of

Amendment of Section 73.202(b), RM-8140
Table of Allotments,
FM Broadcast Stations.
(Central, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 17, 1992; Released: January 13, 1993

Comment Date: March 5, 1993
Reply Comment Date: March 22, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Mel-Mike Enterprises, Inc. ("petitioner"), requesting the substitution of Channel 237C1 for Channel 237C2 at Central, New Mexico, and the modification of Station KZTT's construction permit to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 237C1 for Channel 237C2 at Central since it could enable Station KZTT to expand its coverage area. Channel 237C1 can be allotted to Central in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.6 kilometers (11.6 miles) northwest to accommodate petitioner's desired transmitter site and avoid short-spacings to Station KKRK, Channel 237A, Douglas, Arizona, and Station KLAQ, El Paso, Texas.[1] Mexican concurrence in the allotment is required since Central is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Central, New Mexico	237C2	237C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 5, 1993,** and reply comments on or before **March 22, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard F. Swift, Esq.
Tierney & Swift
1200 Eighteenth Street, N.W.
Suite 210
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 237C1 at Central are North Latitude 32-52-15 and West Longitude 108-18-57.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-314

In the Matter of

Amendment of Section 73.202(b), RM-8142
Table of Allotments,
FM Broadcast Stations.
(Oliver, Pennsylvania)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 17, 1992; Released: January 13, 1993

Comment Date: March 5, 1993
Reply Comment Date: March 22, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by James J. Humes d/b/a Humes Broadcasters ("petitioner") requesting the substitution of Channel 235B1 for Channel 235A at Oliver, Pennsylvania, and the modification of Station WXAK's construction permit to specify the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 235B1 for Channel 235A at Oliver since it will provide the community with its first wide coverage area FM service and enable Station WXAK to expand its service area. Channel 235B1 can be allotted to Oliver in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.6 kilometers (7.8 miles) east to accommodate petitioner's desired transmitter site.[1] Canadian concurrence in the allotment is required since Oliver is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Oliver, Pennsylvania	235A	235B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 5, 1993,** and reply comments on or before **March 22, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Thomas W. Fletcher, Esq.
9825 Laurel Street
Fairfax, Virginia 22031
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 235B1 at Oliver are North Latitude 39-55-15 and West Longitude 79-34-12.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-131

In the Matter of

Amendment of Section 73.202(b), RM-8005
Table of Allotments,
FM Broadcast Stations.
(Copenhagen, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 22, 1992; Released: January 13, 1993

By the Chief, Allocations Branch:

1. At the request of Tia A. Soliday ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 3912 (1992), proposing the substitution of Channel 294C3 for Channel 294A at Copenhagen, New York, and the modification of Station WWLF-FM's construction permit to specify the higher class channel. Petitioner filed comments reiterating her intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 294C3 for Channel 294A at Copenhagen since it could provide the community with a wide coverage area FM service and enable Station WWLF-FM to expand its service area. Channel 294C3 can be allotted to Copenhagen in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.3 kilometers (7 miles) northeast to avoid a short-spacing to Station WPCX, Channel 295B, Auburn, New York.[1] While the allotment would be short-spaced to Station CKO-1, Channel 295C1, Ottawa, Ontario, and vacant Channel 293A at Brockville, Ontario, Canada, we have determined that the allotment will not result in any prohibited interference. Canadian concurrence in the allotment at Copenhagen as a specially negotiated allotment has been received since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 26, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Copenhagen, New York	294C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Tia A. Soliday for Station WWLF-FM, Copenhagen, New York, IS MODIFIED to specify operation on Channel 294C3, in lieu of Channel 294A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Tia A. Soliday, permittee of Station WWLF-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 294C3 at Copenhagen are North Latitude 43-56-30 and West Longitude 75-33-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-129

In the Matter of

Amendment of Section 73.202(b), RM-8006
Table of Allotments,
FM Broadcast Stations.
(Grundy Center, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 22, 1992; Released: January 13, 1993

By the Chief, Allocations Branch:

1. At the request of Grundy Broadcasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 3908 (1992), proposing the substitution of Channel 249C3 for Channel 249A at Grundy Center, Iowa, and the modification of Station KGCI-FM's license to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 249C3 for Channel 249A at Grundy Center since it would provide the community with a wide coverage area FM service and enable Station KGCI-FM to expand its service area. Channel 249C3 can be allotted to Grundy Center in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.2 kilometers (11.3 miles) east to avoid a short-spacing to Station KHBT, Channel 249A, Humbolt, Iowa, and to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify Station KGCI-FM's license to specify operation on Channel 249C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 26, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Grundy Center, Iowa	249C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Grundy Broadcasting Company for Station KGCI-FM, IS MODIFIED to specify operation on Channel 249C3, in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Grundy Broadcasting Company, licensee of Station KGCI-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 249C3 at Grundy Center are North Latitude 42-21-25 and West Longitude 92-33-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-130

In the Matter of

Amendment of Section 73.202(b), RM-8007
Table of Allotments,
FM Broadcast Stations.
(Canyon City, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 22, 1992; Released: January 13, 1993

By the Chief, Allocations Branch:

1. At the request of Blue Mountain Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 3910 (1992), proposing the allotment of Channel 233A to Canyon City, Oregon, as the community's first local aural broadcast service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 233A to Canyon City since an interest in providing the community with its first local aural broadcast service has been expressed. Channel 233A can be allotted to the community without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 26, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Canyon City, Oregon	233A

4. The window period for filing applications will open on **March 1, 1993,** and close on **March 31, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 233A at Canyon City are North Latitude 44-23-18 and West Longitude 118-56-54.

Befor the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 13, 1993

CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENT INVITED

Several local exchange carriers filed proposed revisions to their cost allocation manuals (CAMs) for the separation of regulated and nonregulated costs for the quarter ended December 31, 1992. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

American Telephone and Telegraph Company	AAD 93-1
Ameritech Operating Companies	AAD 93-2
Bell Atlantic	AAD 93-3
BellSouth Corporation	AAD 93-4
Centel Corporation	AAD 93-5
Cincinnati Bell Telephone	AAD 93-6
GTE	AAD 93-7
Lincoln Telephone	AAD 93-8
Nevada Bell	AAD 93-9
NYNEX Telephone Companies	AAD 93-10
Pacific Bell	AAD 93-11
Puerto Rico Telephone Company	AAD 93-12
Rochester Telephone	AAD 93-13
Southern New England Telephone Company	AAD 93-14
Southwestern Bell	AAD 93-15
United Telephone	AAD 93-16
U S West, Inc.	AAD 93-17

Parties may file comments on the proposed revisions to the CAMs no later than **February 12, 1993.** Replies should be filed by **March 1, 1993.** Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L ST., N.W., Room 812, Washington, D.C. 20554 and the Downtown Copy Center (DCC) 1990 M ST., N.W., Suite 640, Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HERITAGE CABLEVISION
ASSOCIATES OF DALLAS, L.P.,
and TEXAS CABLE TV
ASSOCIATION, INC.,
Complainants,

v. File No. PA-89-002

TEXAS UTILITIES
ELECTRIC COMPANY,
Respondent.

ORDER

Adopted: January 7, 1993; Released: January 13, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This order addresses issues involving damages in the above-captioned pole attachment complaint proceeding. As discussed below, we conclude that Texas Utilities Electric Company ("TU Electric") is liable for damages in the amount of $159,647.61, plus interest.

II. BACKGROUND

2. In a previous order in this proceeding,[1] the Commission granted the complaint of TCI Cablevision of Dallas ("TCI") and its predecessors against TU Electric, holding that TU Electric's practice of charging TCI a dual rate structure for certain pole attachments violated Section 224 of the Communications Act.[2] The Commission directed the parties to advise the Commission within sixty days of whether any refund of past pole attachment payments was required and to provide sufficient information to calculate any needed refund.[3]

3. The Bureau has delegated authority over the issues in this proceeding pursuant to Sections 0.91 and 0.291 of the Commission's Rules.[4]

4. The parties responded to the Commission's request by correspondence in January through March of 1992.[5]

Positions of the Parties

5. TCI states that neither it nor its predecessor paid any non-regulated pole attachment rates for 1989 and 1990, so that no refunds are due for those years.[6] TU Electric does not dispute this point, but claims that it is owed $865.69 in rent at the regulated rate for eighty-three pole attachments that were used only to provide non-CATV services and for which TCI did not pay during this time period.[7]

6. TCI, however, does claim a refund for 1991. TCI states that it paid $576,890.90 for all 1991 pole attachment rentals.[8] Of this amount, 1788 poles were paid for at the non-regulated pole attachment rate of $90.00, rather than the regulated pole attachment rate of $4.90.[9] Hence, TCI requests the difference of $85.10 per pole attachment or $152,158.80 in total, as a refund, plus interest from date of payment.[10]

7. In its response to the Commission, TU Electric raises a new issue, for which it admits "no evidence was adduced" during the course of the proceedings in this action.[11] This issue is, "whether the Complainants are required to pay rent on each new cable lashed or otherwise attached to an existing cable on TU Electric's pole."[12] If the Commission finds in the affirmative on this issue, TU Electric argues, this would reduce the refund due TCI at a minimum by $26,137.65, plus interest. [13] TCI, in response, argues that TU Electric has no right to raise this issue at

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[1] *Memorandum Opinion and Order*, 6 FCC Rcd 7099 (1991) ("*Commission Order*"), *recon. dismissed* 7 FCC Rcd 4192 (1992), *petition for review docketed sub. nom. Texas Utilities Electric Co. v. FCC*, No. 92-1032 (D.C. Cir. filed Jan.24, 1992).

[2] 47 U.S.C. §224.

[3] 6 FCC Rcd at 7106, at para. 33, and 7107, at para. 42.

[4] 47 C.F.R. §§0.91, 0.291. Section 0.91 states that the Bureau "acts upon complaints involving cable television pole attachments, except for final action on complaints raising novel or unusual issues." The issue of damages in this proceeding fails to raise either "novel or unusual issues." Therefore, delegated authority in this proceeding properly rests with the Common Carrier Bureau. *See e.g. Multi-Channel TV Cable Company of Mansfield, Inc., et. al. v. Virginia Electric and Power Company*, PA-82-0055 et. al., Mimeo No. 1740 (released January 12, 1983); *Arlington Telecommunications Corp. et. al. v. Virginia Electric and Power*, PA-81-0028 et. al., Mimeo No. 1384 (released January 6, 1982).

[5] Letter dated January 27, 1992, from Paul Glist, counsel for TCI to Donna R. Searcy, Secretary, Federal Communications Commission (*January 27 Letter*); letter dated January 28, 1992, from Michael W. Farber, counsel for TU Electric, to Donna R. Searcy, Secretary, Federal Communications Commission (*January 28 Letter*); letter dated January 29, 1992, from Paul Glist, counsel for TCI, to Donna R. Searcy, Secretary, Federal Communications Commission (*January 29 Letter*); letter dated February 13, 1992, from Michael W. Farber, counsel for TU Electric, to Donna R. Searcy, Secretary, Federal Communications Commission (*February 13 Letter*); letter dated March 6, 1992, from Paul Glist, to Donna R. Searcy, Secretary, Federal Communications Commission (*March 6 Letter*).

[6] *January 17 Letter*, at 1-2.

[7] *January 28 Letter*, at 3. The regulated rate for these attachments was $5.18 per pole, per year in 1989 and $5.25 per pole, per year in 1990.

[8] *Id.* at 1.

[9] *Id.*

[10] *Id.* However, TCI revised its refund request in a January 29, 1992 letter to the Commission because of what appears to have been an error in its mathematical calculations. *See below*, para. 9.

[11] *January 28 Letter*, at 4.

[12] *Id.*

[13] *Id.* at 5.

this point in the proceedings, since this issue could have been raised in its pleadings or its petition for reconsideration.[14]

8. TU Electric also argues that at a meeting between the parties and Commission staff, it was agreed that initially the case would be heard on the narrow issue of whether the Commission has jurisdiction over non-CATV services.[15] Then, TU Electric continues, if the Commission determined it had jurisdiction over the proceeding, it would conduct further proceedings addressing the technical aspects and the facts of this action, including the proper rate for "piggy-backed contacts."[16] TU Electric claims this latter action never took place.[17]

9. Nevertheless, TU Electric concedes that if the Commission determines that the Complainants are not obligated to pay rent on each cable attached to TU Electric's poles, then TCI paid $160,513.30 in excess rentals in 1991,[18] but that this should be reduced by $865.69, the amount of unpaid rentals in 1989 and 1990.[19] TCI in its reply of January 29, 1992, revised its original refund claim to equal the amount of overpayment that TU Electric admits to, and stipulates that the $865.69 should be offset from this amount.[20]

10. TU Electric also requests that the Commission stay this proceeding while its petition for review is pending at the United States Court of Appeals for the District of Columbia.[21] TCI, in response, asks the Commission to reject TU Electric's request for a stay because it was not raised in a separate motion, nor was any showing made that would justify such action by the Commission.[22]

11. On February 13, 1992, TU Electric requested the Commission to disregard TCI's January 29, 1992 letter, which it claims, is an "unauthorized supplement."[23] Furthermore, TU Electric repeated its assertion that the Commission promised to, but did not, bifurcate the complaint into the two separate issues, namely: 1) whether the Commission had jurisdiction over non-CATV pole attachments; 2) and whether TU Electric could charge the regulated pole attachment rate for each cable attached to a pole.[24] TCI replied that it disagrees with TU Electric regarding the deferral of factual issues.[25]

III. DISCUSSION

12. We reject TU Electric's request for a stay of this proceeding for several reasons.[26] First, TU Electric has failed to demonstrate, or for that matter, allege, any facts that would meet the four prong test the Commission relies upon in determining whether to grant a stay of its proceedings.[27] In particular, and most importantly, TU Electric has failed to allege, or make any showing, of the irreparable harm it will suffer if its request for a stay is not granted.[28] TU Electric's request for a stay is thus both factually and legally insufficient.

13. Second, TU Electric's request for a stay, even assuming a factual and legal basis existed to grant it, is procedurally defective. The Commission's Rules clearly state that a request for a stay of a Commission order must be made in a separate pleading or it will not be considered by the Commission.[29] TU Electric's one line request for a stay contained in its response, discussing damages, to the *Commission Order* does not meet this requirement.

14. Notwithstanding our refusal to grant a stay in this proceeding, the Bureau will order that the monies TU Electric is to refund to TCI be placed in an interest-bearing escrow account[30] pending resolution of the D.C. Circuit Court action.[31] This action will protect the interests of all parties involved in this proceeding.

15. We also reject TU Electric's assertion that the Commission did not fully adjudicate the complaint. The Commission's records demonstrate that additional briefing was required on the jurisdictional issue, but there is no indication that other issues were not to be decided based upon the original complaint and response.[32]

16. Finally, we reject TU Electric's argument that the amount of the refund due TCI should be decreased by the amount of the regulated pole attachment rate for each

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[14] *January 29 Letter*, at 2.
[15] *January 28 Letter*, at 4.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 4. TCI paid a rental rate of $94.90 per pole, per year for 1991 on 1705 poles used to provide CATV and non-CATV services (the $4.90 Section 224 rate, plus the $90.00 non-CATV rate). TCI should have paid the Section 224 rate per pole of $4.90, per year. Therefore, TCI paid excess rentals of $153,450 for 1705 poles in 1991 ($90.00 x 1705 poles).

TCI also paid a rental of $90.00 per pole, per year for 1991 on 83 poles used to provide only non-CATV services. TCI should have only paid the Section 224 rate of $4.90 per pole, per year. Therefore, TCI paid excess rentals of $7,063.30 for 83 contacts in 1991 (($90.00 - $4.90) x 83 poles).
[19] *Id.* at 5.
[20] *January 29 Letter*, at 1.
[21] *Id.*
[22] *January 29 Letter*, at 2.
[23] *February 13 Letter*, at 1.
[24] *Id.*
[25] *March 6 Letter*, at 1.
[26] We also reject TU Electric's assertion that TCI's January 29 letter is an "unauthorized supplement." It would be unfair to foreclose TCI from responding to the new issues raised in TU Electric's January 28 letter. Therefore, in the interests of fairness and completeness of the record, we will accept all letter pleadings filed in response to the *Commission Order*.
[27] The Commission's test for a stay requires the petitioner to meet each of the following four prongs: 1) has a strong showing been made that the petitioner is likely to prevail on appeal; 2) has it been shown that without relief, the petitioner will be irreparably injured; 3) would issuance of a stay substantially harm other parties interested in the proceeding; and 4) where does the public interest lie. *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).
[28] *Id.*
[29] 47 C.F.R. §1.44(e).
[30] *See e.g. Virgin Islands Telephone Corporation*, 7 FCC Rcd 4235 (1992); *Communications Satellite Corporation*, 3 FCC Rcd 2643 (1988).
[31] *Texas Utilities Electric Co. v. FCC*, No. 92-1032 (D.C. Cir. filed Jan. 24, 1992).
[32] Letter dated March 12, 1990, from Howard M. Wilchins, Deputy Chief, Enforcement Division, Common Carrier Bureau, Federal Communications Commission, to Michael W. Farber, counsel for TU Electric, and Paul Glist, counsel for TCI.

additional cable lashed to an existing cable on TU Electric's poles. The Commission has held that TU Electric can charge only one regulated rate per pole attachment, not per cable. The support strand is attached to the pole at only one point. The number of cables that are strung along that strand does not affect the total usable space required by the pole attachment.[33]

17. This is not to say that a utility could never adjust upward a regulated pole attachment rate when cables are piggy-backed. The key question would be whether the addition of extra cables caused the utility to incur increased costs of preparing and maintaining poles. The *Commission Order* stated if the utility could make a showing of increased costs that cause the regulated rate to fall outside the bounds of the statutory formula, they could seek relief at the Commission.[34] However, TU Electric has failed to make any showing of increased costs to prepare or maintain the poles to which piggy-backed cables are attached. Therefore, we reject TU Electric's request for a decrease in the refund due TCI.

IV. CONCLUSION

18. Based upon the record before us, we find that TU Electric is liable for a refund to TCI of $159,647.61,[35] plus interest computed on the basis of interest rates specified by the United States Internal Revenue Service. We direct TU Electric to deposit this sum into an interest-bearing escrow account pending judicial review of the Commission's decision in this proceeding, and to furnish the Commission with documentation demonstrating its compliance with this order within thirty (30) days of the release of this order. This approach will protect the rights of all parties.[36]

V. ORDERING CLAUSE

19. ACCORDINGLY, IT IS ORDERED, that pursuant to Sections 4(i) and 224(b) of the Communications Act of 1934, 47 U.S.C. §154(i) and 47 U.S.C. §224(b), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §0.91 and 47 C.F.R. §0.291, that TU Electric IS LIABLE for a refund to TCI in the amount of $159,647.61, plus interest based upon rates specified by the United States Internal Revenue Service.

20. IT IS FURTHER ORDERED that an amount of the refund, plus interest, SHALL BE PLACED in an interest-bearing account, and that proof of this shall be filed with the Commission within thirty (30) days of the release of this order. Interest shall accrue at the prevailing United States Internal Revenue Service Rate.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[33] 6 FCC Rcd at 7106, para. 32. We note that this holding is consistent with the statutory rate formula which sets the maximum rate per pole attachment based on "the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment." 47 U.S.C. §224(d)(1).

[34] The *Commission Order* specifically states:

> Neither party disputes the justness and reasonableness of the rate for "standard" pole attachments contained in the pole lease agreement. Should this rate fall below the statutory minimum prescribed by the statute, TU Electric may, of course, seek relief from the Commission pursuant to Section 224. Likewise, should the rate exceed the maximum prescribed by Section 224, TCI may seek relief. 6 FCC Rcd at 7106, n.46.

[35] This is the amount TU Electric concedes is due if complainants are not obligated to pay rent on each cable attached to TU Electric's poles and includes the offset of $865.69 for the amount of unpaid rentals in 1989 and 1990 for 83 poles. *See January 28 Letter*, at 4-5. TCI stipulates that the $160,513.30 refund may be offset by $865.69. *See January 29 Letter*, at 1.

[36] *See e.g. Virgin Islands Telephone Corporation*, 7 FCC Rcd 4235(1992); *Communications Satellite Corporation*, 3 FCC Rcd 2645 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Alpha Lyracom,	CSS-93-002-(AL)
d/b/a Pan American	CSG-93-045-(AL)
Satellite, Alpha	348-DSE-AL-93
Lyracom Space Communications, Inc.,	
Cygnus Satellite	
Corporation	

Applications for Consent
to *Pro Forma*
Assignment of Domestic and
International Space and Earth
Station Authorizations

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1992; Released: December 31, 1992

By the Chief, Common Carrier Bureau:

1. The above-referenced applications seek consent to the *pro forma* assignment of various international space station licenses and domestic and international earth station licenses from Alpha Lyracom, d/b/a Pan American Satellite ("PAS"), Alpha Lyracom Space Communications, Inc. and Cygnus Satellite Corporation to PanAmSat, L.P. ("Partnership" or "PanAmSat Partnership") (together, "applicants"). The applications were filed before the Commission on December 4, 1992, and were placed on public notice December 18, 1992.[1] Orion Satellite Corporation filed a Petition to Deny and Communications Satellite Corporation filed Comments[2] on December 23, 1992. PanAmSat filed a Reply on December 28, 1992.[3]

BACKGROUND

2. The Partnership to which applicants propose to assign their licenses consists of two general partners, each of which own one percent of the Partnership equity, and limited partners which combined own the remaining 98% of the equity. The Managing General Partner is PanAmSat, Inc. ("PanAmSat"), a U.S. corporation which is 100% owned by Rene Anselmo, the current sole proprietor of PAS and the controlling shareholder of the remaining licensed applicants. The other general partner is Grupo Televisa, S.A. de C.V. ("Televisa"), a publicly-held Mexican company that is controlled by Emilio Azcarraga. Affiliates of PanAmSat and Televisa own 49% each of the limited partner interests. The applicants have submitted, in addition to the necessary assignment of license applications and Licensee Qualification Report, a copy of the "Amended and Restated Agreement of Limited Partnership of PanAmSat, L.P." ("Partnership Agreement"), a "Purchase Agreement" between the Partnership, Televisa, PanAmSat and others, and a letter clarifying certain parts of the Partnership Agreement.[4]

3. The applicants argue that the proposed assignments are in the public interest because they will allow the infusion of capital to assist in financing the expansion of PanAmSat into a global satellite system. This system, applicants state, will be comprised of "three new state-of-the-art satellites -- one in the Pacific Ocean Region (POR), one in the Indian Ocean Region (IOR) and an additional satellite in the Atlantic Ocean Region (AOR)."[5] The applicants further contend that Mr. Anselmo will retain control of the system and that the ownership structure of the Partnership is consistent with Section 310(a) of the Communications Act, as amended ("Act"). Under the proposed Partnership Agreement, PanAmSat, as the Managing General Partner, maintains sole responsibility for day-to-day operations of the partnership and implementation of the Business Plan, subject to the direction and oversight of the Managing Committee and subject to unanimous consent votes for certain extraordinary transactions. The Managing Committee governs the Partnership with the same authority to manage the business and affairs of the Partnership as the board of directors of a corporation has under the Delaware General Corporation Law. PanAmSat designates three members of the Managing Committee; Televisa chooses two. Most acts of the Managing Committee are determined by majority vote.[6] Approval of or action

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[1] *See* Report No. I-6748. The Commission waived Section 25.151 of its rules, as petitioned for by the applicants.

[2] In response to COMSAT's concern regarding Commission review under Section 310 (b) of the Communications Act, as amended, if PanAmSat, L.P. begins to offer pubic-switched services on a common carrier basis, we note that nothing in this decision precludes any future consideration of the issue by the Commission.

[3] Hughes Aircraft Company ("Hughes") also submitted a letter supporting the subject assignment applications and opposing Orion's Petition to Deny. In addition, Orion filed an Initial (December 29, 1992) and Supplemental (December 30, 1992) Response to applicants' Reply. Applicants filed a Reply to Orion's Initial Response on December 30, 1992, and a Supplement to their Reply on December 31, 1992. We accept all pleadings for the record.

[4] The applicants also submitted for staff review only a copy of the Partnership's Satellite Purchase Contract ("Satellite Contract") with Hughes and a copy of the Partnership's Business Plan ("Business Plan").

[5] PAS has launched and is operating a satellite in the AOR. The Commission has granted conditional authorization for PAS to construct, launch and operate one POR satellite, *see Pan American Satellite*, 6 FCC Rcd 5132 (1991), and two IOR satellites. *See Pan American Satellite*, 7 FCC Rcd 2974 (1992); *Pan American Satellite*, 7 FCC Rcd 42 (1992). In addition, PAS has pending an application to modify a second conditional authorization for the AOR. *See* File No. CSS-88-003 (M).

[6] Unanimous consent of the Management Committee Representatives is required before certain actions can be taken by the Partnership. These actions include: 1) engagement in certain material transactions outside the ordinary course of business and not specifically contemplated by the Business Plan or the Agreement; 2) material change to the Business Plan or expenditures which Materially Deviate from the Business Plan; 3) material increase in the level of indebtedness for borrowed

by the Managing Committee is binding on the partners and no partner may act for or assume any obligation or responsibility on behalf of the Partnership unless approved by the Managing Committee.

DISCUSSION

A. Expedited Public Notice

4. We address initially Orion's request that the Commission deny the applications in their present form and require applicants to refile with the Commission additional information subject to the full thirty-day public notice requirement of Section 309(b) of the Communications Act. Orion argues that the proposed assignments cannot properly be characterized as *pro forma* and, therefore, the applications must be placed on public for thirty days.[7] It contends that, based on the present record, there is no reason to expect that Televisa will not be able to exert control over the Partnership. It also argues that applicants offered no true public interest justification for its request that the Bureau waive the thirty-day comment period.[8] Finally, Orion submits that we should require applicants to file additional information for the record, including the satellite construction contract, to assess the legitimacy of applicants' request for expedited action, as well as other information Orion appears to consider necessary to resolve substantive issues regarding the nature of the transaction and the governing structure of the proposed limited partnership.

5. We disagree with Orion that the assignment applications must be denied and refiled subject to the full thirty-day public notice requirement of Section 309 (b) of the Communications Act. Section 309 (b) of the Act, by its terms, does not expressly include non-common carrier international satellite systems, including transmitting earth stations, among the classes of stations for which thirty days' public notice is required. While we have provided by rule a thirty-day public notice period for the assignment or transfer of control of space stations (and transmitting earth station facilities that involve a substantial change in ownership or control),[9] we have ample authority, and there is good cause to, waive the application of this rule in the instant case.[10]

6. As discussed below, the proposed assignment does not involve a change in control of the subject Title III licenses. Section 309 (b) itself recognizes an exception to the thirty-day public notice requirement for assignments that do not involve a substantial change in ownership or control. Moreover, we have previously recognized the unique circumstances U.S. entities must face in implementing separate international satellite systems.[11] U.S. separate system permittees and licensees must secure substantial financing, establish a foreign correspondent relationship, and complete the INTELSAT Article XIV(d) consultation prior to implementing their systems. They are subject to increasing competition from INTELSAT and from foreign-based system operators. We believe the public interest in competitive, international satellite communications is best served by affording our separate systems licensees the maximum flexibility to respond to prevailing market conditions when doing so would not prejudice other U.S. separate system operators or applicants. The instant case involves the potential loss of the applicants' construction as well as launch contracts. In light of our conclusion that PanAmSat's sole shareholder will continue to maintain effective control of the subject Title III licenses, we find no basis for concluding that Orion or any other U.S. separate system operator or applicant will be prejudiced by our action within the time frame requested by applicants.

7. We reject Orion's allegation that PanAmSat cannot be expected to maintain control of the authorized systems. Orion argues that "given his past personal and financial dealings with the Azcarraga family and given [Anselmo's] dependence on the $200 million in new financing through Televisa and Televisa's role as a major customer for the satellite system, it is simply inconceivable that Mr. Anselmo will not defer to the Azcarraga interests and Televisa when he performs in the role as the 'managing general partner' and as a member of the 'Management Committee.'"[12] Commission licensees frequently use a limited partnership as the vehicle through which to finance operation of their radio facilities. Limited partners typically make substantial equity contributions to these partnerships and, as in *Orion*,[13] it is not unusual for those same partners to be customers of the Partnership. These two factors do not necessarily lead to the conclusion that the limited partners control the licensed system. For example, the Commission has authorized Orion to hold the Title III license for a proposed separate system as the general partner of a limited partnership that it controls.[14] Orion's limited partnership arrangement calls for substantial financial contributions by the limited partners, who also may be customers of the Partnership. Notwithstanding the terms of this arrangement, the Commission found, based on the

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money above the amounts contemplated by the Business Plan; 4) dissolution, liquidation or termination of the Partnership; 5) certain distributions; 6) transactions or agreements involving the Partnership or the Managing General Partner in which any Partner or Affiliate has any financial interest other than through its interest in the Partnership; 7) most amendments to the Agreement. In a separate letter, applicants clarified the scope of certain requirements in the unanimous consent clause. *See* Letter, dated December 23, 1992, from Henry Goldberg, Attorney for Applicants, to Donna R. Searcy, Secretary, Federal Communications Commission.

[7] Because PAS considers the proposed assignments to be *pro forma* in nature, it had requested that they not be placed on public notice, citing Section 309(c)(2)(B) of the Act.

[8] The applicants stated in support of their waiver request that "Unless there is a grant by year end, PanAmSat will not have the funds to continue construction of the three satellites it has contracted for, and will have no choice but to terminate its construction contract. PanAmSat's launch contract also is in jeopardy if there is no closing by December 31." *See* Letter, dated December 17, 1992, from Henry Goldberg, Attorney for Applicants, to Donna R. Searcy, Secretary, Federal Communications Commission, released to the public December 18, 1992.

[9] *See* 47 C.F.R. §§ 25.151 (a), 25.151 (c) and 25.151 (d).

[10] *See* 47 C.F.R. Section 1.3.

[11] *See Establishment of Satellite Systems Providing International Communications (Separate Systems)*, 101 FCC 2d 1046, 1164-5 (1985), *on recon.*, 61 RR 2d 649 (1986), *further recon.*, 1 FCC Rcd 439 (1986).

[12] Orion Petition to Deny, at 6.

[13] *See Orion Satellite Corporation*, 6 FCC Rcd at 4945 n.41.

[14] *See Orion Satellite Corporation*, 6 FCC Rcd 4937 (1990).

provisions of the Orion limited partnership agreement, that Orion as general partner retained control of the partnership and of the license.[15]

8. Nor do we find that the additional factor cited by Orion in this case - that of Mr. Anselmo's prior relationship with the Azcarraga family - warrants the conclusion that Mr. Anselmo will not retain control of the Partnership system as set forth in the limited partnership agreement. Orion relies particularly on a series of proceedings in which the Commission considered whether Televisa exercised undue influence over certain television stations, of which Mr. Anselmo was the President and major stockholder. In 1986, an Administrative Law Judge ("ALJ") found that Televisa exercised influence over and direction of two of the stations that "greatly exceeded the degree permitted by section 310(b)" and that this influence was exercised primarily through Mr. Anselmo.[16] The licensee challenged this finding, but before the Commission addressed the challenge, the case was settled by the licensee's agreement to divest its stations.[17] The Commission stated therein that any violation by Televisa was "technical,"[18] and in a subsequent proceeding noted that "there had never been any attempt by SICC to conceal their activities, nor were there any adjudicated violations that related to the licensees' or their principals' truthfulness or reliability."[19] Indeed, the Commission has never made a final determination that Televisa has violated any provision of our rules or the Act.[20] In light of the absence of any final adjudication of wrongdoing by Televisa and the control vested in Mr. Anselmo under the limited partnership agreement, we will not presume, as does Orion, that Mr. Anselmo will not maintain effective control of the licensed systems.

9. We find that upon consummation of the proposed assignment, effective control of the authorized systems will remain with Mr. Anselmo through PanAmSat.[21] The Partnership Agreement and its related documents do not confer authority in Televisa sufficient to constitute control of the system. Mr. Anselmo not only maintains sole responsibility for day-to-day operations of the partnership and implementation of the Business Plan, but also controls the Management Committee, which is in charge of directing and overseeing these functions, as well as of general governance of the Partnership. In addition, except for a special power of attorney granted to the Managing General Partner, no Partner can act or assume any obligation or responsibility on behalf of the Partnership without Managing Committee approval. Thus, Televisa cannot bind in such a way as to control the Partnership unless specifically approved by the Managing Committee. In this context, we find unpersuasive Orion's suggestion that Delaware law does not accord supremacy to the specific provisions of the limited partnership agreement in establishing the respective rights of the general partners. Nor is there any other provision in the Partnership Agreement or the related documents which would have the effect of placing control of the Partnership in the hands of Televisa.

10. Finally, we find that the public record contains all the information we require to find both that an expedited pleading cycle is justified in this case and that the public interest will be served by a grant of the applications under Section 310 (d). As applicants note in their reply to Orion's petition, while the "drop dead" dates under the satellite construction agreement with Hughes are relevant to applicants' need for expedited action, those dates were made publicly available in the assignment applications, which were signed under penalty of law by Mr. Anselmo. Moreover, Hughes has confirmed the relevance of these dates, through its attorneys, and we have independently reviewed the contract, which applicants submitted with a request for confidential treatment. We therefore do not find it necessary for applicants to submit the contract for public inspection to enable us to determine the propriety of waiving the thirty-day public notice period.[22] Finally, we find, contrary to Orion's suggestion, that the public record contains sufficient information to make our public interest findings under Section 310 (d). This information includes all relevant provisions regarding the nature of the transaction and the proposed governing structure of the limited partnership.[23]

B. Imposition of Restrictions on Televisa

11. In addition to their concern over the expedited pleading period in this case, Orion argues that the Commission should impose on the Partnership the same requirements and procedures it imposed on the Orion Partnership. Specifically, Orion notes that it was required by the Bureau "to include numerous provisions in its limited partnership agreement, some patterned after the Commission's broadcast attribution rules, to ensure that the limited partners were insulated from control of the satellite system."[24] Orion also states that the PanAmSat

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[15] *See Orion Satellite Corporation*, 6 FCC Rcd at 4940.

[16] *Spanish International Communications Corp.*, FCC 86-D-1, released January 8, 1986, at ¶17 6. The stations included Spanish International Communications Corporation ("SICC"), Bahia De San Francisco Television Company ("Bahia") and The Seven Hills Television Company ("Seven Hills").

[17] *See Spanish International Communications Corp.*, 2 FCC Rcd 3336 (1987), *appeal dismissed sub nom., Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73 (1991) (*en banc*), *cert. denied*, 112 S.Ct 298 (1991).

[18] *Spanish International Communications Corporation*, 2 FCC Rcd at 3339.

[19] *Univision Holdings, Inc.*, 7 FCC Rcd 6672, 6678 (1992).

[20] In fact, the Commission recently authorized Televisa to hold a non-controlling stake in a broadcast facility. *Univision Holdings, Inc.*, 7 FCC Rcd 6672 (1992).

[21] Because we find that effective control of the Partnership will reside with PanAmSat as managing general partner, we are satisfied that the proposed assignment will not result in any violation of Section 310 (a) of the Act.

[22] Nor do we find it necessary to require disclosure of the contract on the basis that, as suggested by Orion, it might contain information pertaining to whether Hughes has a right to obtain an equity interest in the partnership. We are satisfied that regardless of any right Hughes may have to invest in PAS, the public interest in competitive international satellite systems warrants expedited action by the Commission where, as here, the proposed assignments do not involve a change in control of a Commission authorization.

[23] The applicants submitted the Purchase Agreement for public inspection on December 23, 1992.

[24] Orion, Petition to Deny, at 11. Orion also refers to the new provisions it placed in its limited partnership agreement to limit the ability of the limited partners to exercise control of the system. For example, the limited partnership agreement provided that no limited partner shall take part in the day-to-day management, operation or control of the business and affairs of the Partnership or have any right, power, or authority to act for or on behalf of or to bind the Partnership or transact any business in the name of the Partnership. Limited partners

partnership agreement contains "no comparable provision" regarding either the limited partners or Televisa, in its capacity as general partner. Finally, Orion suggests that the PanAmSat Partnership should be subject to a "pre-screening" requirement, imposed on Orion, under which Orion has submitted background information on each of its limited partners to the Commission, which then sent that information to the executive branch.

12. We disagree with Orion that we must impose the same requirements on Televisa that we imposed on the Orion limited partners. The situation in *Orion* was significantly different than the present. Most importantly, *Orion* involved the use of a limited partnership with foreign equity to finance the operation of a separate satellite system licensed to Orion in its capacity as the general partner. It was therefore important for purposes of Sections 310 (a), 310 (d) and 308 (c) of the Act that the Commission take steps to ensure that Orion maintain effective control of the Partnership and the licensed system.[25] The Commission agreed with Orion that compliance with the Commission's broadcast attribution rules would ensure that the limited partners did not possess authority sufficient to constitute control of the system.[26] While the Partnership Agreement in this case does not contain all of the same restrictions imposed on the Orion limited partners, we do not find it necessary here to follow the insulation requirements of the attribution rules, but rather merely to ensure that effective control resides with PanAmSat, L.P. In the present case, unlike in *Orion*, the Commission need not be concerned that an unlicensed investor may attempt to control the subject Title III authorization, since Televisa will be a part of the licensed entity and subject to FCC jurisdiction.

13. Further, we find no basis for concluding, as Orion seems to suggest, that the proposed transaction raises any issues under Section 308 (c). With regard to Orion's assertion that the Commission should apply the same "pre-screening" requirement to the PanAmSat Partnership that it applied to Orion, we note that applicants have stated their willingness to abide by such a condition.[27] Nevertheless, while we are imposing many of the same requirements on the Partnership that we imposed on Orion to ensure that the Commission retains sufficient information on the identity and interest of new partners prior to the admission of those new partners, we will not formally consult with the executive branch on this assignment. In this case, unlike in *Orion*, the identity and interest of the foreign partner is part of the public record and is known to the Commission, and Televisa will be subject to the Commission's jurisdiction.

14. Upon consideration of the applications and relevant Commission policy, we find that the proposed assignment does not involve a change in ownership or control which would adversely affect the public interest. Accordingly, we consent to the proposed assignments.

ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to Sections 4 (i) and (j), 308, 309, 310 and 319 of the Communications Act, as amended, 47 U.S.C. §§ 4 (i) and (j), 308, 309, 310 and 319, that the applications (File Nos. CSS-93-002-(AL), CSG-93-045-(AL) and 348-DSE-AL-93) filed by Alpha Lyracom, d/b/a Pan American Satellite, Alpha Lyracom Space Communications, Inc., Cygnus Satellite Corporation and PanAmSat, L.P. for consent to the assignment of their international space station and domestic and international earth station licenses ARE GRANTED.

16. IT IS FURTHER ORDERED that PanAmSat, L.P. shall file with the Commission the fully executed Limited Partnership Agreement within 30 days of execution.

17. IT IS FURTHER ORDERED that PanAmSat, L.P. must provide for the Commission the identity and a profile of any entity nominated as a new partner at least 15 days prior to the vote on that partner's admission into the Partnership.

18. IT IS FURTHER ORDERED that any and all amendments and/or modifications to the Limited Partnership Agreement, including the admission of any additional partners, or an alteration of the percentages of equity subscribed to by each partner, shall be filed with the Commission within 30 days of execution.

19. IT IS FURTHER ORDERED that PanAmSat, L.P. must file with the Commission complete information on any alteration of the ownership or voting control share profile of any Partner within 30 days of execution.

20. IT IS FURTHER ORDERED that PanAmSat, L.P. shall file with the Commission within 30 days of execution any and all contracts between PanAmSat and any partner with respect to the operation of the PanAmSat, L.P. satellite system (including, *inter alia*, contracts for customer support, marketing and related services).

21. IT IS FURTHER ORDERED that neither the Licensee, nor any persons or companies directly or indirectly controlling or controlled by the Licensee, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to construct or operate space segment or earth stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons or companies controlling or controlled by the Licensee are parties.

22. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4 (b) (2)).

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were also barred from communicating with the general partner on matters pertaining to the day-to-day operations of the Partnership's communications satellite facilities. *See Orion Satellite Systems*, 6 FCC Rcd at 4945 n.38.

[25] The Commission stated in *Orion* that "proper insulation of the Limited Partners would ensure that the Limited Partners cannot, at least under the terms of Orion's Draft Limited Partnership Agreement, exercise effective control of the Partnership's business and policy decisions." *Orion Satellite Corporation*, 6 FCC Rcd at 4940 (1990).

[26] The Commission stated that Orion could hold the license for the satellite system as long as it retained, in fact, full control of the business and policy decisions of the Partnership.

[27] *See* PAS Reply to Petition to Deny, at 15 n.19.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

APPENDIX

Licenses Which Applicants Propose to Assign

Alpha Lyracom, d/b/a Pan American Satellite

Satellites: PAS-1 (CSS-84-004-P(LA)); PAS-2 (CSS-84-004-P(LA), CSS-88-003(M)); PAS-4 (CSS-91-003); PAS-6 (CSS-91-005); PAS-7 (CSS-91-006).

Earth Stations: CSG-89-001-P/L, CSG-89-002-P/L, CSG-91-113-P/L, CSG-92-127-P/L, E890530 (1114-DSE-P/L-89).

Alpha Lyracom Space Communications

Earth Station: KA-319

Cygnus Satellite Corporation

Satellite: CSS-84-002-P(LA) (*see* CSS-87-002-TC).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IT&E Overseas, Inc. and
PCI Communications, Inc.

Petition for Emergency
Relief and Expedited
Declaratory Ruling

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Chief,
Policy and Program Planning Division

ORDER EXTENDING TIME

Adopted: January 5, 1993; Released: January 6, 1993

By the Chief, Policy and Program Planning Division:

1. On May 29, 1992, the Commission adopted an order requiring the Guam Telephone Authority (GTA) to show cause why GTA should not file interstate and foreign exchange access tariffs that comply with sections 201 and 202 of the Communications Act of 1934.[1] GTA responded to the Commission's Show Cause Order (GTA's Answer) on December 9, 1992.[2] Interested parties were given until January 11, 1993 to comment on GTA's Answer.[3]

2. On December 24, 1992, MCI Telecommunications Corporation (MCI) requested a 45-day extension of time to comment on GTA's Answer. MCI states that GTA's Answer is massive and that GTA's main argument is supported by two lengthy consultant studies. MCI argues that because the consultant studies and other issues require careful evaluation and that more time is needed in order to prepare and file meaningful comments that will assist the Commission, the comment period should be extended.

3. In light of the importance and the complexity of the issues presented in this proceeding, we conclude that the public interest would be served by allowing interested parties some additional time for filing comments. We therefore grant in part MCI's request for an extension of time. We will extend by 30 days the deadline for interested parties to file comments in this proceeding. Any additional extension would unnecessarily delay the final outcome of this matter.

4. ACCORDINGLY, IT IS ORDERED that interested parties may file comments on GTA's Answer not later than **February 10, 1993.**

[1] IT&E Overseas, Inc. and PCI Communications, Inc. Petition for Emergency Relief and Expedited Declaratory Ruling, Memorandum and Opinion and Order, 7 FCC Rcd 4023, 4027 (1992) (*Show Cause Order*).

[2] *See* 7 FCC Rcd 4670 (Com. Car. Bur. 1992); 7 FCC Rcd 7270 (Com. Car. Bur. 1992) (orders extending the time for GTA's response to the *Show Cause Order*).

[3] 7 FCC Rcd at 7270, para. 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 6, 1993

EXPANDED INTERCONNECTION FILING DATE ESTABLISHED FOR OPPOSITIONS TO ILLINOIS COMMERCE COMMISSION REQUEST FOR LIMITED WAIVER

CC DOCKET NO. 91-141

On October 19, 1992, the Commission released a Report and Order and Notice of Proposed Rulemaking in *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 (FCC 92-440), 7 FCC Rcd 7369 (1992) (Report and Order). On December 30, 1992, the Illinois Commerce Commission (Illinois) filed a request for a limited waiver, with respect to Tier 1 local exchange carriers (LECs) in Illinois, of the Report and Order's requirement that such LECs file interstate physical collocation tariffs by February 16, 1993. Instead, Illinois proposes that Tier 1 LECs in Illinois be required to file virtual collocation tariffs by February 16, 1993, and physical collocation tariffs by November 30, 1993. Illinois states that this would allow it enough time to conclude a notice and comment proceeding and issue a formal order on interconnection policy by November 30, 1993.

Comments on this petition are to be filed by Wednesday, **January 13, 1993** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Replies are to be filed by Thursday, **January 21, 1993.** Parties also should send copies of comments and replies to Linda L. Haller, Policy and Program Planning Division, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554 and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1990 M Street, N.W., Washington, D.C. 20036. Copies of the petitions to stay can be obtained from Downtown Copy Center at 202-452-1422.

This remains a non-restricted rulemaking proceeding for purposes of the Commission's *ex parte* rules. *Ex parte* presentations are permitted, except during any Sunshine Agenda period, provided they are disclosed as described in the Commission's rules. *See* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206. For further information, contact Linda L. Haller (202-632-1298) or David L. Sieradzki (202-632-1304), Policy and Program Planning Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WB CABLE
ASSOCIATES LTD.
D/B/A/ WEST BOCA
CABLEVISION
Complainant,

v. File No. PA-91-003

FLORIDA POWER &
LIGHT COMPANY
Respondent.

ORDER

Adopted: January 7, 1993; Released: January 14, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In this Order, we address a complaint brought under Section 224 of the Communications Act[1] by WB Cable Associates Ltd. d/b/a West Boca Cablevision ("WB") against Florida Power & Light Company ("FPL").[2] Section 224 empowers the Commission to adjudicate disputes between cable television system operators and telephone and electric utilities concerning alleged unjust and unreasonable pole attachment rates, terms and conditions. The Bureau has delegated authority over the issues in this proceeding pursuant to Commission rules 0.91 and 0.291.[3]

2. WB alleges that FPL has unjustly and unreasonably imposed a higher charge than the Section 224 regulated rate for the attachment of facilities employed to provide nonvideo services (*e.g.* alarm services) to its utility poles, than for attachments of facilities utilized to provide traditional cable television services.[4] FPL presumes all WB pole attachments are to be used to provide nonvideo services unless the cable operator can establish that the cables attached to a pole provide only traditional cable services. WB asks the Commission to terminate this higher, non-regulated rate and order that FPL refund all amounts paid by WB in excess of the regulated rate for pole attachments under Section 224, plus interest.

3. Respondent FPL seeks dismissal of the complaint, asserting that the Commission lacks jurisdiction to resolve the issues in this proceeding. However, if the Commission finds it has jurisdiction, FPL requests the Commission to rule in its favor because WB has failed to make a *prima facie* showing that the nonvideo license fee is unjust or unreasonable.

4. For reasons discussed below, we conclude that Section 224 authorizes the Commission to regulate the pole attachments at issue in this proceeding. We also find that FPL's imposition of a presumption that pole attachments are utilized to provide non-traditional services is an unjust and unreasonable term and condition of the pole lease agreement.[5] We further conclude that FPL's imposition of a charge higher than the regulated Section 224 rate for pole attachments used to provide nonvideo services is unjust and unreasonable, and that a refund to WB may be warranted.

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[1] 47 U.S.C. §224.

[2] Metropolitan Fiber Systems ("MFS"), Florida Cable Television Association ("FCTA") and Adelphia Communications Corp., Bresnan Communications Company, Continental Cablevision, Inc., Harron Communications Corp., Prime Cable and Time Warner Cable, Inc. (collectively, "Cable Operators") have filed motions for leave to intervene as amicus and amicus briefs. We accept these pleadings in the interest of fairness and for purposes of a complete and accurate record. 47 C.F.R. §1.141; *see e.g. Logan Cablevision, Inc. v. Chesapeake and Potomac Telephone Co. of West Va.*, 50 R.R.2d 300 (1981) *modified on other grounds* Mimeo 5211 (released July 9, 1984).

[3] 47 C.F.R. §§0.91, 0.291. Section 0.91 states that the Bureau "acts upon complaints involving cable television pole attachments, except for final action on complaints raising novel or unusual issues." The issues in this proceeding fail to raise either "novel or unusual issues." *See Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Co.*, 6 FCC Rcd 7099 (1991) (*"Heritage"*), *recon. dismissed* 7 FCC Rcd 4192 (1992), *petition for review docketed sub. nom. Texas Utilities Electric Co. v. FCC*, No. 92-1032 (D.C. Cir. filed Jan.24, 1992). Therefore, delegated authority in this proceeding properly rests with the Common Carrier Bureau. *See e.g. Multi-Channel TV Cable Company of Mansfield, Inc., et. al. v. Virginia Electric and Power Company*, PA-82-0055 et. al., Mimeo No. 1740 (released January 12, 1983); *Arlington Telecommunications Corp. et. al. v. Virginia Electric and Power*, PA-81-0028 et. al., Mimeo No. 1384 (released January 6, 1982).

[4] For purposes of clarity, the terms "conventional" or "traditional" cable services as used herein refer to the delivery of television broadcast signals, cablecast or access programming, or other video programming by cable television systems to subscribers. Excluded from this category are nonvideo and other services not associated with the provision or selection of conventional or traditional cable services, such as electronic mail delivery, alarm services, facsimile transmissions and other data transmission services. *See Heritage*, 6 FCC Rcd at 7099, n.2.

[5] We also reject WB's assertion that FPL's June 10, 1991, Motion to Strike and July 17, 1991, Supplemental Response are unauthorized supplements. We find that it would be unfair to foreclose FPL from responding to new issues raised in WB's Reply of May 6, 1991 and to supply the Commission with updated information necessary for it to decide the issues at hand. We agree with WB that a party must obtain Commission authorization before filing separate, supplemental pleadings under Commission rule 1.1407(a). Although FPL did not obtain the required authorization before filing its responses, we will waive the authorization requirement of 1.1407(a) of our rules and accept the submissions. In making this determination we find that no prejudice to WB will occur. *See i.e. Television Cable Service, Inc. v. Monongahela Power Co.*, 48 R.R.2d 1259 (1981); *but see Teleprompter Corp. v. Alabama Power Co.*, 49 R.R.2d 1410 (1981) (Bureau rejected unauthorized response to a reply and request for hearing in a pole attachment action).

II. DISCUSSION

5. This complaint presents the following issues: 1) does Section 224 authorize the Commission to regulate the pole attachments at issue in this proceeding; and 2) is FPL's imposition of a separate charge for pole attachments that are utilized to provide non-traditional services unjust and unreasonable under Section 224. For the reasons set forth below we answer both questions in the affirmative.

A. Background

6. The essential facts are not in dispute. WB leases space on utility poles owned by FPL in order to deploy cable television transmission facilities within an unincorporated area of the Palm Beach County franchise area. WB provides traditional cable services to subscribers over a system comprised primarily of coaxial cables. Each coaxial cable is lashed to an aerial support strand, which, in turn, is attached at a single point to the FPL pole. In addition to its coaxial cable facilities, WB has deployed security alarm services in certain residential developments, using underground construction. WB has not made attachments to FPL poles or use of FPL conduit within the development. However, the security service generates upstream signals from subscribers within the communities back to the WB cable headend.[6] The coaxial cable carrying video entertainment services is used for these upstream signals.

7. WB provides traditional cable television services, and the security alarm system over this system. These services are provided by the same wire. In every case, WB provides its cable services, whether traditional or not, by a single attachment to the pole.

8. Pursuant to a pole lease agreement executed by the parties, FPL has charged complainants an annual rent of $5.79 per pole to attach equipment employed to provide traditional cable television services during the relevant time period. This rate, which FPL concedes is subject to Commission regulation, is not in dispute in this proceeding. However, FPL has also imposed an annual rental of $16.85 per pole, per year, to attach equipment used to provide non-video broadband services, such as used to provide the transmission of data for an alarm system. The pole lease agreement creates a presumption that all WB attachments are subject to the higher non-regulated rate for non-video cable service unless the cable operator submits a sworn statement that it provides only conventional cable service.

B. Jurisdiction

1. Positions Of The Parties

9. FPL argues that the Commission lacks jurisdiction over the issues in this proceeding. FPL claims that the Commission's jurisdiction over pole attachments, under Section 224, does not extend to those attachments which are used to provide solely intra-state, nonvideo cable services.

10. Conversely, WB argues that Section 224 grants the Commission jurisdiction over all pole attachments made by a cable television operator, whether they are used to provide traditional or nonvideo service. The Cable Operators and FCTA concur with WB that as long as the pole attachment at issue is made by a cable television system, the Commission has jurisdiction. Additionally, WB alleges that the Commission has jurisdiction over the issues in this proceeding since Section 224 has no intrastate limitation.

2. The Commission Has Jurisdiction

11. In the absence of state regulation,[7] Section 224(b)(1) directs that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[8] "Pole attachment" is defined as "any attachment by a cable television system to a pole...owned or controlled by a utility."[9] Recently, the Commission in *Heritage* found that Section 224 grants the Commission jurisdiction over rates charged to cable television systems for pole attachments that support equipment used to provide nonvideo services in addition to traditional cable services.[10] The facts in the instant case are in all relevant respects like the facts in *Heritage*. Therefore, based on the Commission's holding in *Heritage*, we find that Section 224 empowers the Commission to regulate the pole attachments at issue in this proceeding.[11]

C. Different Charges For Pole Attachments

1. Position Of The Parties

12. WB alleges that FPL's imposition of a higher charge for pole attachments that are utilized in providing non-traditional services is unjust and unreasonable under Section 224 of the Communications Act. Additionally, WB argues that it is inconsistent with Section 224 for FPL to place upon the cable television system operator the burden of establishing the content of transmissions over facilities that utilize pole attachments before becoming eligible for the regulated Section 224 rate.

13. Furthermore, FCTA and the Cable Operators argue, along with WB, that cable television transmission of non-traditional service imposes no additional cost or burden on FPL to justify a rate higher than provided in Section 224. They allege that the imposition of the nonregulated charge only provides cable operators with less economic incentive to offer nonvideo services, hence impeding innovative services and lessening competition. This, in turn, they contend, will advantage utilities in competing for the provision of similar services themselves or through affiliated companies.

14. In contrast, FPL argues that if the Commission finds jurisdiction over pole attachments used to provide nonvideo services, it should nonetheless find that the nonregulated rate charged for pole attachments that are utilized in providing nonvideo services is reasonable and just under Section 224. FPL contends that cable television operators

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[6] WB also has a small number of subscribers to the security alarm system that live outside the residential developments along the cable route between the developments and the WB headend.

[7] Any state regulation of rates, terms and conditions for pole attachments governs over federal regulation of pole attachments in that state under certain circumstances. 47 U.S.C. §224(c). Florida does not regulate the rates, terms or conditions of pole attachments for cable television systems. Fla. Stat. §363.02(8).

[8] 47 U.S.C. §224(b)(1).

[9] 47 U.S.C. §224(a)(4).

[10] *Heritage*, 6 FCC Rcd at 7107, para. 39.B

[11] *Heritage*, 6 FCC Rcd at 7105, para. 28.

would receive an unfair advantage in competing against other nonvideo service providers who also use pole attachments, but do not have the benefit of the Section 224 regulated rate. MFS argues that this is an important consideration for the Commission in deciding this case, if it wishes to continue to spur competition in the nonvideo service area.

15. Furthermore, FPL claims that WB has failed to make a *prima facie* showing that its higher charge for pole attachments used to provide nonvideo services is unjust and unreasonable. Additionally, FPL argues that the presumption that services that utilize pole attachments are nonvideo in nature is merely an administrative mechanism which only enables it to correctly assess the rates.

2. Discussion

16. We find FPL's imposition of a higher charge for pole attachments utilized to provide nontraditional services, as well as FPL's presumption that all cable operators' pole attachments are utilized to provide nontraditional services, unjust and unreasonable under Section 224.[12]

17. We find that WB's allegation that it is required to pay a rate for pole attachments used for nonvideo services that is higher than the regulated rate it pays for traditional cable attachments, together with its assertion that all of its pole attachments are properly subject to regulation under Section 224, constitute a *prima facie* showing that the higher rate is unjust and unreasonable. Once that *prima facie* showing is made, the Commission's procedural rules require that the respondent must justify "the rate, term or condition alleged in the complaint not to be just and reasonable.[13] FPL has failed to provide any such justification for a higher rate for pole attachments that are utilized to provide nonvideo services. As in *Heritage*, the respondent in this proceeding fails to make any showing that nontraditional cable service wiring creates additional costs for the operation or maintenance of its poles. Instead, FPL relies on the pole lease agreement which allows a higher charge and which FPL contends was negotiated through arms length bargaining. FPL's reliance on this argument is misplaced. Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company.[14]

18. The Commission stated in *Heritage* that "Section 224 makes no provision for disparate rates based on the type of service provided over the equipment attached to a utility's pole."[15] Section 224 only permits a single, regulated, just and reasonable rate for pole attachments.[16] Based on *Heritage* we hold that FPL may only charge WB a single, regulated rate for pole attachments within WB's franchise area,[17] and that this rate must fall within the parameters established by Section 224(d)(1).[18] Hence, FPL may not charge WB different pole attachment rates depending upon the type of service being provided over the equipment attached to its poles.[19]

19. Additionally, we find that FPL's presumption that all pole attachments are being utilized to provide non-traditional service inconsistent with Section 224 as interpreted by *Heritage*, and as such, an unreasonable and unjust term and condition of the pole lease agreement. Since utilities and telephone companies may only charge the regulated Section 224 rate for the pole attachments of cable television operators, it is immaterial what type of service that the cable operator is providing when utilizing a pole attachment.[20]

20. We will require FPL to refund any amounts paid by complainants in excess of the annual rental for cable television pole attachments as set forth in the pole lease agreement.[21] We direct the parties to advise the Bureau within 60 days of the release of this order whether a refund is

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[12] MFS is concerned that this ruling by the Commission will have the effect of being anti-competitive to alternative service providers. We have taken MFS' views into consideration here, as the Commission did in *Heritage*. We found that Congress, in enacting Section 224 of the Communications Act was concerned about the overreaching and anti-competitive activities of utilities and telephone companies in providing pole attachments to cable television operators. Therefore, Section 224 acts to enhance competition between cable and utilities in the provision of non-video services. While the Commission consistently favors opening markets to all competition, Section 224 is limited in its applicability to cable television operators. *See Heritage*, 6 FCC Rcd at 7104, para. 26.

[13] 47 C.F.R. §1.1407(a).

[14] *See Heritage*, 6 FCC Rcd at 7105, para. 30 *citing* S. Rep. No. 580, 95th Cong., 1st Sess. at 13 *reprinted in* 1978 U.S. Code Cong. & Admin. News at 121.

[15] *Heritage*, 6 FCC Rcd at 7105, para. 31.

[16] Under Section 224 a rate is just and reasonable if it:

> assures a utility the recovery of not less than additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space...which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole... 47 U.S.C. §224(d).

[17] WB's complaint only relates to areas within the scope of its franchise. *See Paragon Cable Television, Inc. v. FCC*, 822 F.2d 152 (D.C. Cir. 1987).

[18] *Heritage*, 6 FCC Rcd at 7106, para. 32. We note that this holding is consistent with the statutory rate formula which sets the maximum rate per pole attachment based on "the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment." 47 U.S.C. §224(d)(1). FCTA raises this point by stating that "regardless of the services transmitted through the cable system...[n]o additional space is utilized and no additional costs are incurred by the utility." *FCTA Amicus Brief*, at 2.

[19] However, this is not to say that a utility could never adjust upward a regulated pole attachment rate when cables are piggybacked. The key question would be "whether the addition of extra cables caused the utility to incur increased costs of preparing and maintaining poles." *Heritage Cablevision Assoc. of Dallas, L.P. v. Texas Utilities Electric Co.*, DA 93-11 (adopted January 7, 1993).

[20] Furthermore, FPL alleges that it applies this presumption only to determine whether the regulated or nonregulated rate should be applied to a particular pole attachment. Since we have held today that there can be only one regulated rate per pole attachment, this term of the pole lease agreement serves no purpose and is therefore terminated.

[21] The parties to this proceeding do not dispute the reasonableness of the $5.79 rate for cable television pole attachments contained in the pole lease agreement. However, should this rate fall below the statutory minimum prescribed by Section 224, FPL may, of course, seek relief from the Commission

required, and if so, to provide sufficient information to enable us to calculate the exact amount of overcharges to be refunded.[22]

III. CONCLUSION

21. We find that Section 224 empowers the Commission to regulate the pole attachments at issue in this proceeding. We find that Section 224 protects WB's pole attachments which support equipment employed to provide nonvideo services in addition to video and other traditional cable television services. We find that FPL's imposition of a higher nonregulated charge for WB's cable system pole attachments for nontraditional services violates Section 224's prohibition against unjust and unreasonable pole attachment rates, terms and conditions. We also find that FPL's presumption that WB's pole attachments are utilized to provide nonvideo services, is an unjust and unreasonable term and condition of the pole lease agreement. Therefore, we conclude that a refund of overcharges may be warranted, and we hereby terminate the unjust and unreasonable surcharge established by Section 15.2 and the presumption that pole attachments are utilized to provide nonvideo services of Section 2.2 of the pole lease agreement.

IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Section 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 224, and Sections 1.1401-1415 of the Commission's rules, 47 C.F.R. §§ 1.1401-1415, that the complaint of WB Cable Associates Ltd. d/b/a West Boca Cablevision against Florida Power & Light Company IS GRANTED to the extent indicated above.

23. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(1) and 224, and Section 1.1410(a) of the Commission's rules, 47 C.F.R. §1.410(a), that the separate annual rental for pole attachments used for other than traditional cable television services, as set forth in Section 15.1 of the pole lease agreement, IS TERMINATED, effective upon release of this order.

24. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(1) and 224, and Section 1.1410(a) of the Commission's rules, 47 C.F.R. §1.410(a), that the presumption of the type of service pole attachments are utilized to provide, as set forth in Section 2.2 of the pole lease agreement, IS TERMINATED, effective upon release of this order.

25. IT IS FURTHERED ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Section 1.1415 of the Commission's rules, 47 C.F.R. §1.1415, that the Motions for Leave to File Brief as Amicus of Adelphia Communications Corp., Bresnan Communications Co., Continental Cablevision, Inc., Harron Communications Corp., Prime Cable, and Time Warner Cable, Inc.; Metropolitan Fiber Systems, Inc.; and Florida Cable Television Association ARE GRANTED.

26. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 224, and Sections 1.1410(c) and 1.145 of the Commission's rules, 47 C.F.R. §§1.1410(c), 1.1415, that the parties SHALL ADVISE the Commission within sixty days of release of this order as to the necessity for a refund of any excess charges paid by complainants to Florida Power & Light Co. since February 22, 1991, as indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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pursuant to Section 224. Alternatively, should the rate exceed the maximum prescribed by Section 224, WB may seek relief from the Commission. *See Heritage*, 6 FCC Rcd at 7106, n.46.

[22] Pursuant to Commission rule 1.410(c), refunds are calculated from the date the complaint, as acceptable, was filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SELKIRK COMMUNICATIONS, INC.
Complainant,

v. File No. PA-91-004

FLORIDA POWER &
LIGHT COMPANY
Respondent.

ORDER

Adopted: January 7, 1993; Released: January 14, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In this Order, we address a complaint brought under Section 224 of the Communications Act[1] by Selkirk Communications, Inc. ("Selkirk") against Florida Power & Light Company ("FPL").[2] Section 224 empowers the Commission to adjudicate disputes between cable television system operators and telephone and electric utilities concerning alleged unjust and unreasonable pole attachment rates, terms and conditions. The Bureau has delegated authority over the issues in this proceeding pursuant to Commission rules 0.91 and 0.291.[3]

2. Selkirk alleges that FPL has unjustly and unreasonably imposed a higher charge than the Section 224 regulated rate for the attachment of facilities employed to provide nonvideo services (*e.g.* data transmission services) to its utility poles, than for attachments of facilities utilized to provide traditional cable television services.[4] FPL presumes all Selkirk pole attachments are to be used to provide nonvideo services unless the cable operator can establish that the cables attached to a pole provide only traditional cable services. Selkirk asks the Commission to terminate this higher, nonregulated rate and order that FPL refund all amounts paid by Selkirk in excess of the regulated rate for pole attachments under Section 224, plus interest.

3. Respondent FPL seeks dismissal of the complaint, asserting that the Commission lacks jurisdiction to resolve the issues in this proceeding. However, if the Commission finds it has jurisdiction, FPL requests the Commission to rule in its favor because Selkirk has failed to make a *prima facie* showing that the nonvideo license fee is unjust or unreasonable.

4. For reasons discussed below, we conclude that Section 224 authorizes the Commission to regulate the pole attachments at issue in this proceeding. We also find that FPL's imposition of a presumption that pole attachments are utilized to provide non-traditional services is an unjust and unreasonable term and condition of the pole lease agreement.[5] We further conclude that FPL's imposition of a charge higher than the regulated Section 224 rate for pole attachments used to provide nonvideo services is unjust and unreasonable, and that a refund to Selkirk may be warranted.

II. DISCUSSION

5. This complaint presents the following issues: 1) does Section 224 authorize the Commission to regulate the pole attachments at issue in this proceeding; and 2) is FPL's imposition of a separate charge for pole attachments that

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[1] 47 U.S.C. §224.

[2] Metropolitan Fiber Systems ("MFS"), Florida Cable Television Association ("FCTA") and Adelphia Communications Corp., Bresnan Communications Company, Continental Cablevision, Inc., Harron Communications Corp., Prime Cable and Time Warner Cable, Inc. (collectively, "Cable Operators") have filed motions for leave to intervene as amicus and amicus briefs. We accept these pleadings in the interest of fairness and for purposes of a complete and accurate record. 47 C.F.R. §1.141; *see e.g. Logan Cablevision, Inc. v. Chesapeake and Potomac Telephone Co. of West Va.*, 50 R.R.2d 300 (1981) *modified on other grounds* Mimeo 5211 (released July 9, 1984).

[3] 47 C.F.R. §§0.91, 0.291. Section 0.91 states that the Bureau "acts upon complaints involving cable television pole attachments, except for final action on complaints raising novel or unusual issues." The issues in this proceeding fail to raise either "novel or unusual issues." *See Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Co.*, 6 FCC Rcd 7099 (1991) ("*Heritage*"), *recon. dismissed* 7 FCC Rcd 4192 (1992), *petition for review docketed sub. nom. Texas Utilities Electric Co. v. FCC*, No. 92-1032 (D.C. Cir. filed Jan. 24, 1992). Therefore, delegated authority in this proceeding properly rests with the Common Carrier Bureau. *See e.g. Multi-Channel TV Cable Company of Mansfield, Inc., et. al. v. Virginia Electric and Power Company*, PA-82-0055 et. al., Mimeo No. 1740 (released January 12, 1983); *Arlington Telecommunications Corp. et. al. v. Virginia Electric and Power*, PA-81-0028 et. al., Mimeo No. 1384 (released January 6, 1982).

[4] For purposes of clarity, the terms "conventional" or "traditional" cable services as used herein refer to the delivery of television broadcast signals, cablecast or access programming, or other video programming by cable television systems to subscribers. Excluded from this category are nonvideo and other services not associated with the provision or selection of conventional or traditional cable services, such as electronic mail delivery, alarm services, facsimile transmissions and other data transmission services. *See Heritage*, 6 FCC Rcd at 7099, n.2.

[5] We also reject Selkirk's assertion that FPL's June 10, 1991, Motion to Strike and July 17, 1991, Supplemental Response are unauthorized supplements. We find that it would be unfair to foreclose FPL from responding to new issues raised in Selkirk's Reply of May 6, 1991 and to supply the Commission with updated information necessary for it to decide the issues at hand. We agree with Selkirk that a party must obtain Commission authorization before filing separate, supplemental pleadings under Commission rule 1.1407(a). Although FPL did not obtain the required authorization before filing its responses, we will waive the authorization requirement of 1.1407(a) of our rules and accept the submissions. In making this determination we find that no prejudice to Selkirk will occur. *See i.e. Television Cable Service, Inc. v. Monongahela Power Co.*, 48 R.R.2d 1259 (1981); *but see Teleprompter Corp. v. Alabama Power Co.*, 49 R.R.2d 1410 (1981) (Bureau rejected unauthorized response to a reply and request for hearing in a pole attachment action).

are utilized to provide non-traditional services unjust and unreasonable under Section 224. For the reasons set forth below we answer both questions in the affirmative.

A. Background

6. The essential facts are not in dispute. Selkirk is the cable franchisee for the city of Fort Lauderdale and the Greater Fort Lauderdale area. Selkirk leases space on utility poles owned by FPL in order to deploy cable television transmission facilities within its Fort Lauderdale franchise area. Selkirk provides traditional cable services to subscribers over a system comprised primarily of coaxial cables. Each coaxial cable is lashed to an aerial support strand, which, in turn, is attached at a single point to the FPL pole. In addition to its coaxial cable facilities, Selkirk has deployed fiber optic cable in certain parts of its system. This fiber optic cable, like the coaxial cable, is overlashed to the aerial support strand without the need for additional guying or anchoring.

7. Selkirk provides traditional cable television services, as well as non-traditional cable services over this system. Sometimes these services are provided in one cable, while at other times they are provided by separate cable, but the cables are lashed to the same messenger cable. In every case, Selkirk provides its cable services, whether traditional or not, by a single attachment to the pole.

8. Pursuant to a pole lease agreement executed by the parties, FPL has charged complainants an annual rent of $5.79 per pole to attach equipment employed to provide traditional cable television services during the relevant time period. This rate, which FPL concedes is subject to Commission regulation, is not in dispute in this proceeding. However, FPL has also imposed an annual rental of $16.85 per pole, per year, to attach equipment used to provide nonvideo broadband services, such as used to provide the transmission of data for an alarm system. The pole lease agreement creates a presumption that all Selkirk attachments are subject to the higher nonregulated rate for nonvideo cable service unless the cable operator submits a sworn statement that it provides only conventional cable service.

B. Jurisdiction

1. Positions Of The Parties

9. FPL argues that the Commission lacks jurisdiction over the issues in this proceeding. FPL claims that the Commission's jurisdiction over pole attachments, under Section 224, does not extend to those attachments which are used to provide solely intra-state, nonvideo cable services.

10. Conversely, Selkirk argues that Section 224 grants the Commission jurisdiction over all pole attachments made by a cable television operator, whether they are used to provide traditional or nonvideo service. The Cable Operators and FCTA concur with Selkirk that as long as the pole attachment at issue is made by a cable television system, the Commission has jurisdiction. Additionally, Selkirk alleges that the Commission has jurisdiction over the issues in this proceeding since Section 224 has no intrastate limitation.

2. The Commission Has Jurisdiction

11. In the absence of state regulation,[6] Section 224(b)(1) directs that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[7] "Pole attachment" is defined as "any attachment by a cable television system to a pole...owned or controlled by a utility."[8] Recently, the Commission in *Heritage* found that Section 224 grants the Commission jurisdiction over rates charged to cable television systems for pole attachments that support equipment used to provide nonvideo services in addition to traditional cable services.[9] The facts in the instant case are in all relevant respects like the facts in *Heritage*. Therefore, based on the Commission's holding in *Heritage*, we find that Section 224 empowers the Commission to regulate the pole attachments at issue in this proceeding.[10]

C. Different Charges For Pole Attachments

1. Position Of The Parties

12. Selkirk alleges that FPL's imposition of a higher charge for pole attachments that are utilized in providing nontraditional services is unjust and unreasonable under Section 224 of the Communications Act. Additionally, Selkirk argues that it is inconsistent with Section 224 for FPL to place upon the cable television system operator the burden of establishing the content of transmissions over facilities that utilize pole attachments before becoming eligible for the regulated Section 224 rate.

13. Furthermore, FCTA and the Cable Operators argue, along with Selkirk, that cable television transmission of non-traditional service imposes no additional cost or burden on FPL to justify a rate higher than provided in Section 224. They allege that the imposition of the nonregulated charge only provides cable operators with less economic incentive to offer nonvideo services, hence impeding innovative services and lessening competition. This, in turn, they contend, will advantage utilities in competing for the provision of similar services themselves or through affiliated companies.

14. In contrast, FPL argues that if the Commission finds jurisdiction over pole attachments used to provide nonvideo services, it should nonetheless find that the nonregulated rate charged for pole attachments that are utilized in providing nonvideo services is reasonable and just under Section 224. FPL contends that cable television operators would receive an unfair advantage in competing against other nonvideo service providers who also use pole attachments, but do not have the benefit of the Section 224 regulated rate. MFS argues that this is an important consid-

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[6] Any state regulation of rates, terms and conditions for pole attachments governs over federal regulation of pole attachments in that state under certain circumstances. 47 U.S.C. §224(c). Florida does not regulate the rates, terms or conditions of pole attachments for cable television systems. Fla. Stat. §363.02(8).

[7] 47 U.S.C. §224(b)(1).

[8] 47 U.S.C. §224(a)(4).

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[10] *Heritage*, 6 FCC Rcd at 7105, para. 28.

eration for the Commission in deciding this case, if it wishes to continue to spur competition in the nonvideo service area.

15. Furthermore, FPL claims that Selkirk has failed to make a *prima facie* showing that its higher charge for pole attachments used to provide nonvideo services is unjust and unreasonable. Additionally, FPL argues that the presumption that services that utilize pole attachments are nonvideo in nature is merely an administrative mechanism which only enables it to correctly assess the rates.

2. Discussion

16. We find FPL's imposition of a higher charge for pole attachments utilized to provide nontraditional services, as well as FPL's presumption that all cable operators' pole attachments are utilized to provide nontraditional services, unjust and unreasonable under Section 224.[11]

17. We find that Selkirk's allegation that it is required to pay a rate for pole attachments used for nonvideo services that is higher than the regulated rate it pays for traditional cable attachments, together with its assertion that all of its pole attachments are properly subject to regulation under Section 224, constitute a *prima facie* showing that the higher rate is unjust and unreasonable. Once that *prima facie* showing is made, the Commission's procedural rules require that the respondent must justify "the rate, term or condition alleged in the complaint not to be just and reasonable.[12] FPL has failed to provide any such justification for a higher rate for pole attachments that are utilized to provide nonvideo services. As in *Heritage*, the respondent in this proceeding fails to make any showing that nontraditional cable service wiring creates additional costs for the operation or maintenance of its poles. Instead, FPL relies on the pole lease agreement which allows a higher charge and that such an agreement was negotiated through arms length bargaining. FPL's reliance on this argument is misplaced. Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company.[13]

18. The Commission stated in *Heritage* that "Section 224 makes no provision for disparate rates based on the type of service provided over the equipment attached to a utility's pole."[14] Section 224 only permits a single, regulated, just and reasonable rate for pole attachments.[15] Based on *Heritage* we hold that FPL may only charge Selkirk a single, regulated rate for pole attachments within Selkirk's franchise area,[16] and that this rate must fall within the parameters established by Section 224(d)(1).[17] Hence, FPL may not charge Selkirk different pole attachment rates depending upon the type of service being provided over the equipment attached to its poles.[18]

19. Additionally, we find that FPL's presumption that all pole attachments are being utilized to provide non-traditional service inconsistent with Section 224 as interpreted by *Heritage*, and as such, an unreasonable and unjust term and condition of the pole lease agreement. Since utilities and telephone companies may only charge the regulated Section 224 rate for the pole attachments of cable television operators, it is immaterial what type of service that the cable operator is providing when utilizing a pole attachment.[19]

20. We will require FPL to refund any amounts paid by complainants in excess of the annual rental for cable television pole attachments as set forthin the pole lease agreement.[20] We direct the parties to advise the Bureau within 60 days of the release of this order whether a refund is

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[11] MFS is concerned that this ruling by the Commission will have the effect of being anti-competitive to alternative service providers. We have taken MFS' views into consideration here, as the Commission did in *Heritage*. We found that Congress, in enacting Section 224 of the Communications Act was concerned about the overreaching and anti-competitive activities of utilities and telephone companies in providing pole attachments to cable television operators. Therefore, Section 224 acts to enhance competition between cable and utilities in the provision of non-video services. While the Commission consistently favors opening markets to all competition, Section 224 is limited in its applicability to cable television operators. *See Heritage*, 6 FCC Rcd at 7104, para. 26.

[12] 47 C.F.R. §1.1407(a).

[13] *See Heritage*, 6 FCC Rcd at 7105, para. 30 *citing* S. Rep. No. 580, 95th Cong., 1st Sess. at 13 *reprinted in* 1978 U.S. Code Cong. & Admin. News at 121.

[14] *Heritage*, 6 FCC Rcd at 7105, para. 31.

[15] Under Section 224 a rate is just and reasonable if it:

> assures a utility the recovery of not less than additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space...which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole... 47 U.S.C. §224(d).

[16] Selkirk's complaint only relates to areas within the scope of its franchise. *See Paragon Cable Television, Inc. v. FCC*, 822 F.2d 152 (D.C. Cir. 1987).

[17] *Heritage*, 6 FCC Rcd at 7106, para. 32. We note that this holding is consistent with the statutory rate formula which sets the maximum rate per pole attachment based on "the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment." 47 U.S.C. §224(d)(1). FCTA raises this point by stating that "regardless of the services transmitted through the cable system...[n]o additional space is utilized and no additional costs are incurred by the utility." *FCTA Amicus Brief*, at 2.

[18] However, this is not to say that a utility could never adjust upward a regulated pole attachment rate when cables are piggybacked. The key question would be "whether the addition of extra cables caused the utility to incur increased costs of preparing and maintaining poles." *Heritage Cablevision Assoc. of Dallas, L.P. v. Texas Utilities Electric Co.*, DA 93-11, (adopted January 7, 1993).

[19] Furthermore, FPL alleges that it applies this presumption only to determine whether the regulated or nonregulated rate should be applied to a particular pole attachment. Since we have held today that there can be only one regulated rate per pole attachment, this term of the pole lease agreement serves no purpose and is therefore terminated.

[20] The parties to this proceeding do not dispute the reasonableness of the $5.79 rate for cable television pole attachments contained in the pole lease agreement. However, should this rate fall below the statutory minimum prescribed by Section 224, FPL may, of course, seek relief from the Commission pursuant to Section 224. Alternatively, should the rate exceed the maximum prescribed by Section 224, Selkirk may seek relief from the Commission. *See Heritage*, 6 FCC Rcd at 7106, n.46.

required, and if so, to provide sufficient information to enable us to calculate the exact amount of overcharges to be refunded.[21]

III. CONCLUSION

21. We find that Section 224 empowers the Commission to regulate the pole attachments at issue in this proceeding. We find that Section 224 protects Selkirk's pole attachments which support equipment employed to provide nonvideo services in addition to video and other traditional cable television services. We find that FPL's imposition of a higher nonregulated charge for Selkirk's cable system pole attachments for nontraditional services violates Section 224's prohibition against unjust and unreasonable pole attachment rates, terms and conditions. We also find that FPL's presumption that Selkirk's pole attachments are utilized to provide nonvideo services, is an unjust and unreasonable term and condition of the pole lease agreement. Therefore, we conclude that a refund of overcharges may be warranted, and we hereby terminate the unjust and unreasonable surcharge established by Section 15.2 and the presumption that pole attachments are utilized to provide nonvideo services of Section 2.2 of the pole lease agreement.

IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Section 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 224, and Sections 1.1401-1415 of the Commission's rules, 47 C.F.R. §§ 1.1401-1415, that the complaint of Selkirk Communications, Inc. against Florida Power & Light Company IS GRANTED to the extent indicated above.

23. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(1) and 224, and Section 1.1410(a) of the Commission's rules, 47 C.F.R. §1.410(a), that the separate annual rental for pole attachments used for other than traditional cable television services, as set forth in Section 15.1 of the pole lease agreement, IS TERMINATED, effective upon release of this order.

24. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(1) and 224, and Section 1.1410(a) of the Commission's rules, 47 C.F.R. §1.410(a), that the presumption of the type of service pole attachments are utilized to provide, as set forth in Section 2.2 of the pole lease agreement, IS TERMINATED, effective upon release of this order.

25. IT IS FURTHERED ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Section 1.1415 of the Commission's rules, 47 C.F.R. §1.1415, that the Motions for Leave to File Brief as Amicus of Adelphia Communications Corp., Bresnan Communications Co., Continental Cablevision, Inc., Harron Communications Corp., Prime Cable, and Time Warner Cable, Inc.; Metropolitan Fiber Systems, Inc.; and Florida Cable Television Association ARE GRANTED.

26. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 224, and Sections 1.1410(c) and 1.145 of the Commission's rules, 47 C.F.R. §§1.1410(c), 1.1415, that the parties SHALL ADVISE the Commission within sixty days of release of this order as to the necessity for a refund of any excess charges paid by complainants to Florida Power & Light Co. since February 22, 1991, as indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[21] Pursuant to Commission rule 1.410(c), refunds are calculated from the date the complaint, as acceptable, was filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-382

In re Applications of

EVELYN RAY ROGERS and MORRIS A. ROGERS d/b/a THE DUNLIN GROUP	File No. BPH-880629MC
SEASIDE WIRELESS, LTD.	File No. BPH-880701MF
H.H. & L., INC., d/b/a H.H. & L COMMUNICATIONS	File No. BPH-880701MM

For Construction Permit
for a New FM Station
on Channel 280A in Seaside,
California

Appearances

Kathryn R. Schmeltzer, Esq. and *Gregory L. Masters, Esq.* on behalf of Evelyn Ray Rogers and Morris A. Rogers d/b/a The Dunlin Group; *Dennis Kelly, Esq.* on behalf of Seaside Wireless, Ltd., L.P.; *David E. Honig, Esq.* on behalf of H.H.& L., Inc. d/b/a H.H.& L. Communications; *Charles E. Dziedzic, Esq.* and *Gary P. Schonman, Esq.*, on behalf of the Chief, Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: January 7, 1993; Released: January 14, 1993

PRELIMINARY STATEMENT

1. Based on Supplemental Points and Authorities filed on November 4, 1992, by Evelyn Ray Rogers and Morris A. Rogers d/b/a The Dunlin Group ("Dunlin") the Presiding Judge revisits an earlier ruling that denied a disposition of this case by summary decision. In that prior ruling there remained an unresolved genuine issue of material fact with respect to the issues of whether Dunlin had a reasonable assurance of a financial ability when it certified affirmatively in its application and whether Dunlin had misrepresented its financial ability to the Commission. *See Memorandum Opinion and Order*, FCC 92M-722, released June 30, 1992.[1] The facts also disclosed that Dunlin had made a post-filing attempt to obtain a commitment of reasonable assurance from a second lending source. Because of the substantial question already raised about Dunlin's reasonable assurance at certification, the apparent need for a post-filing second loan commitment provided the basis for adding a Section 1.65 disclosure issue, i.e., whether Dunlin had failed to disclose to the Commission that it was not financially qualified until it had obtained its post-filing commitment. *Id.* That duty to disclose under §1.65 could be resolved only after it was determined that Dunlin was financially qualified at its certification. Therefore, the §1.65 issue could not be resolved at the time that the second motion for summary decision was under consideration. *Id.*

2. There is a related Joint Request For Approval Of Settlement under consideration that was filed on October 9, 1992. Under its terms, Dunlin would receive the grant in return for payments to the remaining applicants as follows: Seaside Wireless Ltd., L.P. ("Wireless") to receive $65,000 and H.H.& L., Inc. d/b/a H.H.& L. Communications ("HHL") to receive $35,000. Both payouts are represented as constituting the respective parties' reasonable and prudent expenses. Acceptance of the settlement is contingent on the resolution of the disqualifying issues by summary decision in favor of Dunlin.

3. On November 4, 1992, Dunlin filed its Supplemental Points And Authorities. *See* Presiding Judge's *Order* FCC 92M-975, released September 25, 1992. HHL filed its Documentation Of Expenses on that same date. On November 12, 1992, HHL filed a Supplement To Documentation Of Expenses. On November 18, 1992, the Mass Media Bureau (the "Bureau") filed its Consolidated Comments On Joint Request For Approval Of Settlement Agreements and Supplemental Points And Authorities in which it supports the settlement and the granting of the related relief.

FINDINGS OF FACT

Dunlin Financial Issues

4. On the date of its financial certification, June 29, 1988, Dunlin had made a good faith estimate of its costs for construction and three months of operations at $241,300. It is accepted as fact that the Dunlin principals had liquid assets in the amount of $171,057 at certification and needed a bank letter to show a reasonable assurance only as to the remaining $70,000.[2]

5. The letter at issue was signed by the Bank of America ("BOA") on June 29, 1988. Initially, there were substantial questions of fact raised with respect to the BOA letter because it did not disclose an interest rate which was to be negotiated and because the length of the loan was not

[1] There had been an earlier motion for summary decision that also had been denied because there remained unresolved genuine issues of material fact. *See Memorandum Opinion & Order*, FCC 92M-361, released March 24, 1992. Thus, Dunlin and the other applicants have tried on two separate occasions to resolve this case by summary decision incident to a settlement.

[2] Dunlin has asserted that it has liquid assets that are sufficient to meet the entire amount of the estimated expenses. However, the resolution of that assertion need not be determined in the disposition of this case since based on an analysis of Dunlin's latest submission it appears that Dunlin reasonably relied on a bank letter at the time of certification and there is no genuine issue concerning current financial ability.

discussed with a bank official before the letter was issued. *See MO&O FCC 92M-361, supra* at Paras. 14-16. Also, Ms. Judith G. Spencer ("Spencer"), who was a former Branch Manager of BOA and the official who had signed the letter, had testified that after her meeting with Dunlin's principal, she had contacted the bank's "Business Loan Center" which wrote the letter for Ms. Spencer's signature. *Id.* at Para. 9. There was no evidence of the information that was considered by the loan center. Yet the first Spencer affidavit expressly averred that the BOA letter was based on "information provided" and that the letter was written and authorized by the loan center. *Id.* Without evidence of the information that was relied upon by BOA's approval authority it was found to be inappropriate to decide the issues by summary decision. *Id.* If the bank authorized the letter without obtaining sufficient information, the letter could be characterized as an accommodation.

6. The controlling issue for determination is the following:

> To determine whether the Dunlin Group had reasonable assurance of a loan from the Bank of America when it filed its application and whether the Dunlin Group was financially qualified on the date that it filed its application.

If there was a reasonable assurance at certification of the availability of a BOA loan for at least $70,000, then Dunlin was financially qualified and the financial and the misrepresentation issues can now be summarily resolved. *Cf. Shawn Phalen*, 5 F.C.C. Rcd 53 (Review Board 1990)(summary decision on financial issue will be granted only where there is no evidence of an accommodation). Also, if the evidence now shows that Dunlin was financially qualified at certification there was no duty for Dunlin to disclose under §1.65 and that issue can also be summarily resolved without a hearing.

7. In order to address the evidentiary concerns regarding BOA's letter, Dunlin submits a second affidavit executed by Ms. Spencer on October 26, 1992, which supplements her earlier affidavit in certain material respects. Dunlin also submits a portion of the transcript of the hearing testimony of Mr. Rogers, one of its principals. The BOA letter was in contemplation of a loan to Dunlin in the amount of $100,000. In her latest affidavit, Ms. Spencer testified that when Mr. Rogers appeared seeking a commitment, he explained to her the purpose for the loan and he provided her with a "briefcase full of written material." That material included a business plan that he showed to Ms. Spencer. They also discussed the liquid assets of the Dunlin principals and the terms of the proposed loan, including collateral that the bank would require and an interest rate that was 1.5% above the existing CD rate. Ms. Spencer made notes of the meeting. She stated in her affidavit:

> After the meeting I had with Mr. Rogers, I contacted a loan officer at the business lending division of the Bay Area Loan Center of BOA and provided him with the information I had from Mr. Rogers. During our conversation, I related to the loan officer the information that Mr. Rogers provided me based on the notes I had taken. The loan officer composed the June 1988 BOA letter based on the information I provided.

8. Ms. Spencer further avers that she recalls specifically seeing a letter of a BOA official which indicated that Ms. Rogers previously had repaid a six figure loan in a timely manner. A copy of that letter is attached to the Spencer affidavit. It refers to a loan that was made in 1979 and repaid in 1982, and it states that the amount of that loan was greater than the amount requested for Dunlin. Ms. Spencer states in her affidavit that she does not recall a discussion regarding Ms. Rogers' prior loan history. But she further states that the information about Ms. Rogers' favorable loan history is looked on "very favorably" at the time an actual loan is made.

9. Mr. Rogers was able to corroborate in part an essential portion of the Spencer affidavit in his hearing testimony of June 11, 1991. Specifically, he testified that a document that was entitled "Dunlin Group Broadcast Budget, June 1988" was prepared by himself and his wife prior to his visit to BOA. It was presented to BOA as a part of Dunlin's business plan along with a financial statement.

Legitimate And Prudent Expenses

10. Seaside documented its expenses in numerous pages attached to the Joint Request (Appendices A through W). HHL has documented its own expenses through its later filings of November 4 and 12, 1992. Seaside claims expenses in the amount of $65,000 which include $11,617 in legal fees that were billed by a prior communications counsel.[3] HHL has submitted documentation in support of $38,000 in expenses. It is noted that this case has gone through deposition discovery and there has been a Phase I hearing. Also, there have been three filings for summary decision which have required substantial input from counsel in addition to travel and related expenses. It is expected under such a history of extensive litigation that costs will be substantial. Under the circumstances here, the costs of Seaside and HHL in this case are found to be legitimate and prudent.

CONCLUSIONS OF LAW

11. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

[3] The prior communications counsel claims that Seaside owes $35,852 in prior legal fees. However, that amount has been contested by Seaside. Only $11,617 of that amount has been paid by Seaside which is the amount attributable to a former representation for which approval is sought in this proceeding.

47. C.F.R. §1.251(a)(1). As the moving party, Dunlin has the burden of establishing that summary decision would be appropriate based on its papers. *Summary Decision Procedures*, 34 F.C.C. 485, 487-88 (1972). For reasons stated below, it is concluded that Dunlin has now met its burden.

12. The controlling issue of fact as to which Dunlin has the burden of showing that there is no genuine issue to resolve at a hearing is whether the BOA letter of June 29, 1988, was "a mere accommodation." *MO&O* FCC 92M-722, *supra*. In an earlier Declaration, Ms. Spencer asserted in conclusory fashion that the BOA letter evidenced an intent to lend funds to Dunlin to construct and operate a new FM station at Seaside. In her latest Declaration, Ms. Spencer attests to the fact that Mr. Rogers had produced substantial documentation including a business plan and a financial statement. In addition, Ms. Spencer's latest submission explains the transmission of the information found in those key documents to the loan officer in another division of BOA and contains her representation that it was based on that transmitted information that a loan officer prepared and authorized the letter. Specifically, the letter was prepared by BOA's business lending division at the Bay Area Loan Center after Ms. Spencer had forwarded her notes of her conversation with Mr. Rogers which included reference to a discussion about the Rogers' liquid assets. There also was reference to a discussion of the terms of the proposed loan which included agreement to an interest rate of 1.5% above the prevailing CD rate. It is also noted that at the hearing phase of the case, Mr. Rogers had testified that he had shown Ms. Spencer the business plan which included current financial data. (Tr. 160-62.) There also is convincing evidence that BOA had a favorable past loan history with Ms. Rogers which was timely repaid and which was in an amount that exceeded the amount sought by Dunlin for the Seaside project. These facts are substantial evidence to establish that the BOA letter was not a mere accommodation.

13. One element lacking proof is the length of the loan period. *Cf. Scotio Broadcasters Ltd. Partnership*, 5 F.C.C. Rcd 5158, 5160 (Review Bd 1990), *review denied*, 6 F.C.C. Rcd 1893 (Comm'n 1991), *recon. dismissed*, 6 F.C.C. Rcd 4626 (Comm'n 1991) (central to any "reasonable assurance" finding is a showing that "tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.") *See also Chapman Radio & Television Co.*, 70 F.C.C. 2d 2063, 2072 (Comm'n 1979) (bank must be satisfied that borrower is fully familiar with and accepts terms and conditions of proposed loan including the payment period). However, the showing that there was a face-to-face meeting at which was discussed a business plan that included financial statements and that there was a favorable loan history of Ms. Rogers at the same bank are found to be substantial evidence of a reasonable assurance of Dunlin's financial ability at certification. *See Harrison County Broadcasting Co.*, 6 F.C.C. Rcd 5819, 5821-22 (Review Bd 1991) (reasonable assurance found despite vague collateral terms). *See also A.P. Walter, Jr.*, 6 F.C.C. Rcd 875, 877-78 (Review Bd 1991) (reasonable assurance found despite lack of collateral term in letter where borrower had past banking relationship). The Review Board has held that a vague reference to "other conditions" will not alone defeat a finding of a reasonable assurance and that the "existence of such terms in a commitment letter is not fatal if key provisions are provided and the overall circumstances demonstrate that reasonable assurance is present." *Lynn Broadcasting*, 7 F.C.C. Rcd _____, Review Bd *Slip Op.* FCC 92R-90, released December 17, 1992. Here, the overall circumstances of the meeting with Ms. Spencer, the disclosure of a business plan which included a financial statement, and the past history of meeting a BOA loan obligation are cumulatively probative of a reasonable assurance.

14. It is well established that an applicant has the burden of demonstrating that it possesses the qualifications to be a Commission licensee in accordance with the Act [47 U.S.C.§308(b)]. *Midwest Radio-Television, Inc.* , 24 F.C.C. 2d 625, 626 (Comm'n 1970). In this case, Dunlin has met the burden of proving its financial qualifications by demonstrating that it had a reasonable assurance of a loan commitment from BOA at the time that it filed its application. *Marlin Broadcasting of Central Florida, Inc.*, 5 F.C.C. Rcd 5751 (Comm'n 1990). Where an applicant relies on a bank letter, as has Dunlin, the prospective borrower must provide the bank with sufficient financial information and also must accept the bank's terms and conditions. *Northampton Media Associates*, 4 F.C.C. Rcd 5517 (Comm'n 1989). Also, where there is a long and established banking relationship shown to exist, there is an inference that the lender is thoroughly familiar with the prospective borrower's assets, credit history, current business plan and similar data. *Id.* Based on the evidence referred to above, Dunlin substantially meets the *Northampton* criteria. Mr. Rogers personally appeared before Ms.Spencer and disclosed planning documents that included a business plan and a financial statement. That information was communicated by Ms. Spencer to BOA's loan department before the loan was approved. Mr. Rogers was also informed of the interest rate to be paid over the term of the loan. Finally, the bank was familiar with a favorable loan history of Ms. Rogers which involved a timely pay off of a loan amount which exceeded the amount of the commitment sought by Dunlin. Therefore, Dunlin has met its burden of proof and the financial issues are resolved in its favor, including the issue of a possible misrepresentation.[4]

15. Also, since it is found that Dunlin had reasonable assurance of its financing when it filed its application, there was no reporting obligation that was violated under §1.65 and that issue also shall be resolved in Dunlin's favor. *See New Broadcasting Corp.*, 44 F.C.C. 2d 386 (Comm'n 1973) (Commission's rules provide for a summary decision where there are no genuine issues of material fact for determination at a hearing).

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[4] *See also Peter Joseph Devlin*, 7 F.C.C. Rcd 2499 (Review Bd 1992) (an applicant must "establish a sufficient dialogue with the bank, so that the latter has a present firm intention to make [the] loan, future conditions permitting"). That standard also has been met by Dunlin. The evidence of a dialogue between Mr. Rogers and Ms. Spencer is well established by the Spencer declarations.

SETTLEMENT

16. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience or necessity, and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311(c)(3). *See Oak Television of Everett, et al.*, 93 F.C.C.2d 926 (Review Bd 1983).

17. The Bureau supports the settlement. The applicants have satisfied the requirements of the Commission's rule regarding settlement [47 C.F.R. §73.3525]. The settling parties have established that approval of the settlement would serve the public interest and that none of the applications was filed for an improper purpose. Also, Wireless has adequately demonstrated legitimate and prudent expenses of $65,000 and HHL has shown the same with respect to $38,000, the respective settlement amounts for which approval for payment is sought. In addition, the public interest will be served by approval of this settlement which will eliminate the need for further protracted litigation and the corresponding utilization of resources, and which ensures that a new FM service will be delivered to Seaside, California at an earlier date. Accordingly, it is appropriate that the proposed settlement be accepted.

RELATED MATTERS

18. On August 6, 1992, Dunlin filed a Motion To Disqualify Counsel For Seaside Wireless, LTD. L.P.; on August 17, 1992, Wireless filed an Opposition To Motion To Disqualify Counsel; and on August 25, 1992, Dunlin filed a Reply To Opposition To Motion To Disqualify Counsel. Because of the removal of a need to go forward with the litigation of all issues by virtue of the settlement, the Motion To Disqualify will be dismissed as moot.

19. On September 25, 1992, counsel for Dunlin filed a Statement For The Record to advise the Review Board of the intended settlement. The Presiding Judge had urged the informing of the Review Board of this development because there are interlocutory appellate matters before the Board. There has been no direction from the Review Board that would negate the settlement of this case at the trial level.

20. There is an unresolved Notice Of Forfeiture which the Presiding Judge had set against Seaside. *See Memorandum Opinion And Order And Notice Of Forfeiture*, FCC 91M-2683, released August 30, 1991. [5] These were apparent forfeitures preliminarily assessed by the Presiding Judge in accord with the Commission's *Policy Statement On Standards For Assessing Forfeitures*, 6 F.C.C. Rcd 4695. Where, as here, there is a settlement, the Commission will determine whether a forfeiture is appropriate in light of the alleged misconduct. *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 F.C.C. Rcd 3403, 3409 (1991). Therefore, in accordance with the Commission's policy and rules, the allegations which caused the forfeiture notice against Seaside will be forwarded to the General Counsel for appropriate action. See 47 C.F.R. §1.80(g).

ORDER

IT IS ORDERED that the Motion To Disqualify Counsel for Seaside Wireless LTD., L.P. is denied as moot.

IT IS FURTHER ORDERED that the Motion For Summary Decision filed by Evelyn Ray Rogers and Morris A. Rogers d/b/a The Dunlin Group, as revisited under the Supplemental Points And Authorities filed on November 4, 1992, IS GRANTED and the issues with respect to Dunlin's financial certification, a related misrepresentation, and a reporting failure under §1.65 are resolved in the applicant's favor.

IT IS FURTHER ORDERED that the Joint Request For Approval Of Settlement that was filed by the applicant parties on October 9, 1992, as supplemented on November 12, 1992 with a documentation of expenses, IS GRANTED and the Settlement IS ACCEPTED.

IT IS FURTHER ORDERED that the application of Seaside Wireless LTD., L.P. (File No. BPH-880701MF) and the application of H.H.& L., Inc. d/b/a H.H.& L. Communications (File No. BPH-880701MM) ARE DISMISSED with prejudice.

IT IS FURTHER ORDERED that the application of Evelyn Ray Rogers and Morris A. Rogers d/b/a The Dunlin Group (File No. BPH-880629MC) to construct a new FM Station on Channel 280A in Seaside, California, IS GRANTED.[6]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

[5] *See also* related *Memorandum Opinion and Order*, FCC 92M-845, released August 5, 1992 (denial of motion to delete forfeiture issue) and *Memorandum Opinion and Order*, FCC 92M-889, released August 19, 1992 (denial of request for interlocutory appeal of designation of forfeiture issue).

[6] This Summary Decision disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion.47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Malrite Communications Group, Inc. — File Nos. BR-890531XP and BRH-890531XQ

For Renewal of License of
Stations WHK(AM)/WMMS(FM)
Cleveland, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1992; Released: January 14, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications for the two captioned radio stations; (ii) a Petition to Deny timely filed on September 1, 1989, by the Ohio State Conference of Branches of the National Association for the Advancement of Colored People (NAACP) and the Cleveland, Ohio branch of the NAACP against the above-captioned renewal applications;[1] (iii) an opposition from the licensee; and (iv) the licensee's responses to staff letters of inquiry. The NAACP alleges that the above-captioned stations violated the Commission's equal employment opportunity (EEO) Rule and policies. The NAACP requests that the Commission designate the licensee's renewal applications for hearing and deny the applications.

II. BACKGROUND

2. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the petition to deny were declarations, under penalty of perjury, from the presidents of the Ohio State Conference of Branches of the NAACP and the Cleveland, Ohio, branch of the NAACP, the latter of whom lives in the service area of both stations. Although the state president's declaration does not, by itself, establish standing,[2] we find that the declaration from the Cleveland branch president meets the requirements for standing for the Cleveland, Ohio, branch as well as for the Ohio State Conference of Branches of the NAACP. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987); *see also Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Therefore, the challenge filed by the NAACP constitutes a valid petition to deny against the two captioned stations.

III. PLEADINGS

4. The NAACP derived its factual allegations from the licensee's EEO program and annual employment reports. Review of its allegations led us to conclude that the NAACP presented a *prima facie* case demonstrating that, as to both stations, unconditional grant of the renewal applications would have been inconsistent with the public interest.[3] Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1). *Astroline, supra.* Further inquiry was, therefore, necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

5. Review of the NAACP's allegations and supporting documentation as well as the licensee's renewal applications, opposition and inquiry responses leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that the licensee engaged in discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline, supra.* Accordingly, we will grant renewal unconditionally, albeit with an admonition.

IV. DISCUSSION

6. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and

[1] The Petition to Deny also includes 19 other radio stations in Ohio. They will be addressed in separate Commission actions. The Petition included the National Black Media Coalition (NBMC) as a co-petitioner against WHK(AM)/WMMS(FM). On September 20, 1989, NBMC withdrew its petition to deny as it pertained to WHK(AM)/WMMS(FM).

[2] The state president's declaration does not allege that he is a listener of or resident within the service area of either of the challenged stations.

[3] The licensee was not challenged regarding its recruitment of women. Nonetheless, as is our practice in all cases, we reviewed the licensee's EEO efforts in this respect, and we found them to be sufficient.

promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b) and (c).

7. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (hereinafter *Broadcast EEO*), *petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

8. A review of the licensee's 1989 EEO Program Report, opposition to the petition to deny and responses to our letters of inquiry reveals that WHK(AM) and WMMS(FM) had 46 overall, 28 upper-level, full-time hiring opportunities from June 1, 1986, through September 30, 1989. The licensee used several general recruitment sources from which it received minority referrals: *The Cleveland Plain Dealer* (7), *Cleveland Spotlight* (1), Ohio School of Broadcasting (1), Central State University (3), and Cuyahoga Community College (4). It also contacted Ohio State University, Wilberforce College, University of Akron, Kent State University, Case Western Reserve, Ohio University, Women in Communications, RAN Association, Cleveland Works, Inc., Connecticut School of Broadcasting, *Call and Post*, other stations and employee referrals from which it reported no minority referrals. The licensee reported receiving minority referrals from these minority-specific sources: Urban League (5) and Spanish-American Committee (3). The licensee also contacted the NAACP, Ohio Civil Rights Commission, Black Media Workers, National Black Media Coalition, National Association of Black Journalists, Cleveland Job Corps Center, Cleveland American Indian Center and Black Focus but did not report receiving any referrals from them. It claims to have received more minority referrals than it lists, but indicates that its records are incomplete as to the total number received. Also, it states that it examined its EEO efforts starting in January 1989, and added more minority-specific sources on May 30, 1989.

9. For 27 of its 46 openings, the licensee reports that it contacted most of the above sources but did not report specifically which sources were contacted for which openings. For three openings, it used only media ads and, for one opening, used a talent search firm. For another opening, it recruited only from the Ohio School of Broadcasting, from which it hired a Black woman. For the remaining 14 openings, it did not recruit publicly. Thus, the licensee recruited for 32 of 46 openings overall and 24 of 28 upper-level openings. It also reports that it interviewed 460 applicants for its full-time openings, including 54 minorities (11.7%). Minorities were present in applicant pools for 21 openings (45.7%) overall and for 14 (50.0%) of the 28 upper-level openings. The licensee hired four minorities -- three Blacks and one Hispanic (8.7% of total hires). Of its 28 upper-level hires, the licensee hired one (3.6%) minority (Black).[4]

10. The NAACP asserts that the licensee has a questionable EEO program that uses few minority-specific sources. It criticizes the licensee for hiring few minorities, employing a declining number of minorities in only token numbers and for abandoning a formerly effective EEO program for a new, virtually neutral, program.

11. The licensee asserts that it has employed a significant number of minorities in a variety of positions throughout its term. It notes that only from late 1988 to early 1989 did the number of minority employees decline.[5] The licensee

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[4] The Cleveland, Ohio MSA is 42.3% female and 17.8% minority (15.8% Black, 1.2% Hispanic, 0.7% Asian and 0.1% American Indian). According to the licensee's Annual Employment Reports, in 1983, the licensee employed 61 employees, 48 upper-level, of whom six (9.8%) were Blacks, with three Blacks (6.3%) in upper-level positions. In 1984, the licensee employed 59 employees, 47 upper-level, of whom seven (11.9%) were minorities (six Blacks), with four (8.5%) minorities in upper-level positions, including three Blacks. In 1985, the licensee employed 54 employees, 39 upper-level, of whom seven (13.0%) were minorities (six Blacks), with three (7.7%) Blacks in upper-level positions. In 1986, the licensee employed 58 employees, 42 upper-level, of whom 10 (17.2%) were minorities (seven Blacks), with four (9.5%) minorities in upper-level positions, including three Blacks. In 1987, the licensee employed 54 employees, 38 upper-level, of whom nine (16.7%) were minorities (six Blacks), with four (10.5%) minorities in upper-level positions, including three Blacks. In 1988, the licensee employed 57 employees, 38 upper-level, of whom eight (14.0%) were minorities (five Blacks), with three minorities (7.9%) in upper-level positions, including two Blacks. In 1989, the licensee employed 63 employees overall, 38 upper-level, of whom five (7.9%) were minorities (three Blacks), with one Black employee (2.6%) in an upper-level position.

[5] The licensee notes that its employment of minorities overall and Blacks, the dominant minority group here, was above 50% of parity with the Cleveland labor force in every year of the license term except 1989. It also notes that its employment of minorities in upper-level positions was near or above 50% of parity in 1984, 1986 and 1987. Furthermore, as evidence that the modified EEO efforts begun in the first five months of 1989 constituted a good faith effort, the licensee notes that in 1990, it employed 62 employees overall, 40 upper-level, with nine (14.5%) minorities (seven (11.3%) Blacks) overall and four (10.0%) Blacks in upper-level positions. Also, according to the 1991 Annual Employment Report filed by the licensee, the stations employed 57 employees, lost no minorities from 1990 and gained one Black lower-level employee. Post-term EEO performance is not considered in the Commission's evaluation of a licensee's EEO record during a license term if that record, standing alone, is so deficient that it would merit denial of renewal or other sanctions (i.e., forfeiture or short-term). *See Applications of Rust Communications Group, Inc. for Renewal of Licenses for Stations WHAM and WHFM(FM), Rochester, New York*, 73 FCC 2d 39, 53 (1979). However, we will consider the licensee's post-term EEO performance here because, as we state *infra*, we find that the licensee's EEO record during the license term warrants renewal without sanction. Accordingly, we will consider the licensee's post-term minority hires as evidence that the EEO program implemented during the license term was a good-faith effort.

states that the stations "were going through a period of unprecedented turmoil" in late 1988 which was when four minority employees left full-time positions at the stations.[6] However, after a new general manager was hired at the end of 1988, the licensee states that it evaluated its EEO program and expanded its efforts, hiring three minorities before the license term ended on October 1, 1989. Moreover, contrary to the NAACP's assertions that it uses few minority-specific sources and has a new neutral EEO program, the licensee notes that it used minority-specific sources in recruiting for most openings and expanded its source list in 1989 to include 10 minority sources for all openings.

12. After reviewing the record, we find no substantial and material question of fact sufficient to warrant a hearing. In addition, we find no evidence indicating that the licensee engaged in discrimination. We note that during the license term, the licensee obtained minority referrals, had minorities in almost half of its applicant pools, and interviewed and hired minorities. Moreover, it employed minorities throughout the license term.

13. Although the licensee did not track referrals of all minorities interviewed, the licensee's records reflected an EEO program that was ongoing through the term. It obtained minority applicants in almost half of the applicant pools and minority recruitment efforts were more productive for upper-level than lower-level jobs. We also note that self-assessment and modifications during the term resulted in three additional minority hires before the end of the term. Given this record, we believe that unconditional renewal of the licenses is warranted. However, we caution the licensee to improve the completeness and accuracy of its recruitment records and to ensure that it engages in minority recruitment efforts for each vacancy. *See Applications of Certain Broadcast Stations Serving Communities in the State ofArkansas,* 6 FCC Rcd 4938, 4939-40 (1991) (KARN(AM)).

V. CONCLUSION

14. After considering the evidence and arguments submitted by the NAACP and the licensee in the instant case, we find that a hearing is not warranted and the record of the licensee supports the granting of its renewal applications. The licensee is cautioned to improve its record-keeping and to ensure that it engages in minority recruitment efforts for each vacancy.

VI. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that the Petition to Deny filed by the NAACP against both stations in the instant case IS DENIED.

16. IT IS FURTHER ORDERED that the license renewal applications filed by Malrite Communications Group, Inc. for Stations WHK(AM)/WMMS(FM), ARE GRANTED.

17. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

18. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[6] A Black sales person left to take a sales management position at another station which she subsequently left to return to work for a television station also owned by the licensee. Another minority employee, an Hispanic clerk, left the stations without notice or explanation. The third minority employee, a clerk, switched to part-time status to attend school. Finally, a minority sales person left. The licensee did not identify the race of the two employees listed last.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Applications	File Nos.
of Pasco Pinellas Broadcasting	BR-880926UG
Company, Licensee of Stations	BRH-880926UR
WLVU(AM), Dunnedin, Florida	
and WLVU-FM, Holiday, Florida	

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1992; Released: January 14, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it (i) a timely petition filed by the Florida State Conference of Branches of the NAACP and its respective branches (NAACP) for reconsideration of the Commission's decision in *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893 (1990) (*Miami*), to grant the renewal applications of Stations WLVU(AM)/WLVU-FM; (ii) a petition filed by Pasco Pinellas Broadcasting Company (Pasco) for reconsideration of the Commission's decision to sanction Stations WLVU(AM)/WLVU-FM; (iii) NAACP's opposition to Pasco's petition; and (iv) Pasco's opposition to NAACP's petition and its reply to the NAACP's opposition. NAACP alleges that the above-cited stations violated the Commission's equal employment opportunity (EEO) Rule and policies and that the Commission erred when it granted the stations' renewal applications. It requests that the Commission reconsider its decision, designate these applications for hearing and then deny renewal. Pasco argues that the Commission acted arbitrarily and capriciously when it sanctioned the stations. It contends that the Commission did not fully consider the facts presented by Pasco and that the Commission imposed more severe sanctions on Pasco than on other licensees in similar situations. Pasco requests that the Commission reconsider the imposition of sanctions on its stations, grant renewal of the licenses for a full term and reduce the imposed forfeiture amount. For reasons discussed below, we deny the NAACP's petition and Pasco's petition and affirm our original grant of the renewal applications.

II. DISCUSSION

2. Reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). 47 C.F.R. Section 1.106(c). We find that the petitioners have failed to meet the above standard in this case and the reconsideration requests are denied.

3. In *Miami*, we noted: (1) Pasco had 58 overall (48 upper-level) hiring opportunities from January 1986 to October 1, 1988; (2) it listed no minority referrals from its recruitment sources; (3) it maintained general contact with minority recruitment sources but did not appear to contact them for specific vacancies; (4) it was able to list the number, gender and race of applicants for only 18 of 58 vacancies; (5) it generally did not maintain adequate records and did not appear to engage in meaningful self-assessment of its EEO program; and (6) it hired no minorities during the license term despite 58 hiring opportunities in a labor force area that is 15.2% minority. Accordingly, we imposed reporting conditions, a Notice of Apparent Liability of Forfeiture of $18,000 and a short term renewal.

NAACP's Petition for Reconsideration

4. The NAACP argues that the renewal applications of WLVU(AM)/WLVU-FM should have been set for a hearing to determine whether the licensee engaged in discrimination. It contends that the Commission erred when it granted renewal because the Commission improperly relied on immaterial and irrelevant information in mitigation of an EEO record which, standing alone, could not have happened but for discrimination. The NAACP contends that it presented statistics to support this argument in its May 15, 1990, reply comments, which the Commission ignored without explanation. The NAACP also argues that the Commission should have determined if the licensee's argument -- that it could not hire minorities because of its distance (23 miles) from high minority concentrations -- was indicative of discriminatory intent. *NBMC v. FCC*, 775 F.2d 342, 357 (1985).

5. Next, the NAACP denominates as "irrational" the Commission's finding of no discrimination based on the facts that there were no sudden departures of minorities and no question as to the veracity of the information submitted, unlike in *Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (*Beaumont*). The NAACP argues that the licensee would have been well aware that it had no Black employees nor Black applicants and that discrimination is the only possible explanation for this behavior. It argues that this licensee had a record of failing to recruit and hire minorities similar to but more egregious than that in *Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59 (D.C. Cir. 1977) (hearing required where substantial statistical disparity accompanied by responsible allegations of overt discrimination and serious questions as to adequacy of affirmative action plan) (*Black Broadcasting*).

Pasco's Opposition

6. In response, the licensee argues that "the FCC is not the Equal Employment Opportunity Commission (EEOC) and a license renewal proceeding is not a Title VII suit." The licensee argues that because the Commission's affirmative action policy is prospective, unlike the EEOC which aims primarily at remedying the effects of past discrimination, it rarely designates renewal applications for hearing solely to investigate affirmative action performance. The licensee acknowledges that a hearing may be warranted where responsible and well pleaded claims of discrimination have been made, but argues that the NAACP did not make such claims in this case.

7. The licensee contends that the statistics contained in the NAACP's reply comments, on which the NAACP bases its claim of discrimination, are inaccurate as well as irrelevant to this proceeding. The licensee argues that the NAACP used incomplete and often nonexistent data to perform its calculations. In addition, the licensee contends that the labor force data used by the NAACP in its calculations is not the same labor force data used by the Commission when analyzing a station's EEO program. The NAACP uses state labor force data in some of its calculations whereas the Commission uses the labor force of a Metropolitan Statistical Area or County. Finally, the licensee contends that "evidence of statistical disparity between the number of minority employees and the number of relevant minorities in the labor force is not, in and of itself, sufficient grounds to order the FCC to conduct a hearing." *See NBMC v. FCC, supra.*

8. Contrary to the NAACP's contentions, the licensee states that its case is not similar to *Black Broadcasting.* Pasco argues that the licensee in *Black Broadcasting,* unlike Pasco, did not contact minority organizations and was charged with specific instances of overt discrimination in its rejection of a Black applicant for employment and its termination of a Black employee. Although it believes its stations' overall profile is better than that of WSBY(AM)/WQHQ(FM), Pasco contends that the fact that the Commission compared WLVU(AM)/WLVU-FM to stations that were not designated for hearing "provides a good illustration of how far removed the facts in the case are from raising a substantial and material question of fact necessary to warrant a hearing."

Discussion

9. Upon review of the NAACP's petition for reconsideration and the licensee's opposition, we find that reconsideration is not appropriate. Regarding the NAACP's argument that the Commission failed to consider the statistical arguments made in its reply to the licensee's inquiry response, the data on which the NAACP's arguments were based were before us as they were submitted in response to our letter of inquiry. We reviewed the data, considered the NAACP's arguments and, although not specifically noted in the order, found the arguments to be without merit. We have again reviewed the NAACP's argument and find that it does not support the relief requested.

10. The NAACP used a statistical argument which, as the licensee correctly argues, the Commission does not employ. In its reply, the NAACP argues that in order to determine if applicant and hiring data make out a statistical *prima facie* case of discrimination, one must determine the probability that the selection of a particular number of minorities out of all total selections could not have occurred by chance. *See Hazelwood School District V. U.S.,* 433 U.S. 299 (1977). The NAACP calculates this figure using the hypergeometric distribution. The statistics calculated by the NAACP are not based on the Commission's EEO guidelines but, as indicated by the NAACP, are based on computations used in cases brought under Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e-(2)a. *See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services,* 2 FCC Rcd 3967 (1987) *(Broadcast EEO) petition for reconsideration pending.* A statistical disparity alone is not sufficient grounds to order a hearing. *See NBMC v. FCC, supra.* When challenging a renewal in a Petition to Deny, a petitioner must establish that granting the renewal is *prima facie* inconsistent with the public interest. 47 U.S.C. Section 309(d)(1). The NAACP did not meet this standard. The petitioner should have addressed the Commission's EEO guidelines that focus on the licensee's efforts to implement an effective EEO program. We also disagree with the NAACP's contention that the Commission should determine if the licensee's argument -- that it was unable to hire minorities because it was too distant from areas with high concentrations of minorities in the workforce -- is indicative of discriminatory intent. Our evaluation of the licensee's EEO record as a whole, including comparison with Commission processing guidelines and consideration of the licensee's distance argument as well as other factors, see n.2, *infra,* did not raise an inference of discrimination. Therefore, absent additional evidence suggesting discriminatory intent, a *prima facie* case of discrimination was not raised.

11. Finally, we reject the NAACP's argument that our failure to find discrimination in light of *Beaumont* is "irrational." In *Bilingual-Bicultural Coalition on Mass Media V. FCC,* 595 F.2d 621 (D.C. Cir. 1978), the court indicated that a substantial statistical disparity between the available minority labor force and the station's minority employment together with a languishing EEO program raises questions as to whether the station's poor EEO performance owes to inadvertence or to intentional discrimination. Our analysis of this licensee's EEO performance showed it to be substantially insufficient, thus warranting a significant sanction, but there was no evidence that the insufficiency was due to intentional discrimination. We found this case not as egregious as *Beaumont* in which the inference of discrimination was present in the firing of seven Black and no white employees. In *Black Broadcasting,* there were complainants, an applicant and an employee, alleging overt discrimination, again a case more egregious than this. Here we determined that a hearing was not necessary, but that significant sanctions were, and we have no arguments before us to change that determination. The lack of minority employees here does not, by itself, raise a substantial and material question of fact warranting a hearing. Nor is the EEO program so languishing here that, in combination with the substantial statistical disparity, a hearing is warranted. Accordingly, the NAACP's petition for reconsideration is denied.

Pasco's Petition for Reconsideration

12. In its petition for reconsideration, Pasco first argues that the Commission's conclusions about the stations' EEO program did not take into account the evidence that Pasco submitted regarding the frequency with which it contacted recruitment sources. Pasco states that it submitted examples of specific job announcements sent to sources listed in its EEO program, including the local Urban League. The licensee contends that despite this evidence the Commission concluded that Pasco did not apparently contact minority sources for specific vacancies.

13. Second, Pasco argues that the Commission ignored its formal alternative labor force request. Pasco states that it submitted alternative data in its renewal application showing that the two counties in which its stations are located, Pinellas County for the AM station (7.7%) and Pasco County for the FM station (10.9%), had minority labor forces significantly smaller than that of the MSA (15.2%). In its opposition to the petition to deny, Pasco stated that the alternative labor force was more appropriate for its stations because: the stations are located more than 20

miles from the majority of the minority labor force in the MSA; the road system was inadequate because it consisted of no freeways; and its recruitment efforts directed at the areas in the MSA with a high concentration of minorities had proven fruitless. Pasco contends that its submissions satisfied the Commission's three part test found in *Broadcast EEO, supra*. It also maintains that the Commission's failure to use the alternative labor force data was reversible error because Pasco's EEO efforts appear suspect without the use of the alternative data. Moreover, it contends that if the alternative data had been used, the Commission would have considered the data as a mitigating factor in its consideration of Pasco's EEO program and would not have imposed a short term renewal or forfeiture.

14. Third, Pasco argues that the Commission erred when it concluded that Pasco did not engage in self-assessment of its EEO program because it did not have records of every applicant interviewed during the license term. Pasco states that "it did not need to review its past hiring record to know that it lacked minorities in both its applicant pool and on its full-time staff." It claims that it did periodically update and modify its EEO program in an effort to improve its minority applicant pool. It contends that its self-assessment efforts, including sending a response card with each general and specific letter sent to sources listed in its EEO program, were mentioned by the Commission but not accepted as legitimate.

15. Finally, Pasco argues that the sanctions imposed on it by the Commission for its alleged EEO violations are more severe that those imposed on other similarly situated licensees and, therefore, are contrary to Commission precedent. These licensees include the owners of Stations WSBY(AM)/WQHQ, Salisbury/Ocean City, Maryland; Station WRGI(FM), Naples, Florida; Station KVII-TV, Amarillo, Texas; Station WTCB(FM), Orangeburg, South Carolina; Stations WOOJ(AM)/WOOJ-FM, Lehigh Acres, Florida; and Station WOWW(FM), Pensacola, Florida.[1]

NAACP's Opposition

16. In its opposition, the NAACP argues that Pasco's alternative labor force argument is frivolous because it implies that Blacks do not commute to work by car. Further, the NAACP contends that Pasco's statement that it knew it lacked minorities in its applicant pool and on its full-time staff supports the NAACP's argument that the stations' EEO record was not due to poor recordkeeping. Therefore, the NAACP argues that "the Commission must decide this matter on the basis of whether or not the licensee engaged in intentional violations of the EEO Rule or intentional discrimination."

Pasco's Reply

17. In its reply, Pasco makes several arguments. First, it contends that the NAACP's failure to respond to Pasco's argument -- that the Commission applied disparate treatment to Pasco compared with other licensees -- means that the NAACP agreed with this argument. Second, it states that the NAACP has presented no evidence of discrimination by the licensee. Third, it contends that it never stated or implied that Blacks do not commute to work by car; it simply argued that the substantial distance between the stations and the Tampa/St. Petersburg area combined with the status of the road between them -- slow highway driving -- makes it difficult to recruit anybody from that area.

Discussion

18. With respect to Pasco's first argument, we note that we did take into account the evidence that Pasco submitted regarding its frequency of contacts with general and minority sources. However, as we stated in *Miami*, although Pasco contended that it contacted sources listed in its EEO program when vacancies arose, "most of its documentation consist[ed] of generalized form letters." *Miami* at 4897. Therefore, we concluded that the licensee did not appear to have contacted sources for specific vacancies, the only recruitment practice which we have found to be effective as demonstrated by this case.

19. Second, the licensee argues that the Commission ignored the licensee's alternative labor force request. In *Miami*, we noted the licensee's statement that the stations were "located more than twenty miles north of the Tampa/St. Petersburg area and that no public transportation [was] available." *Id.* at 4898. However, we did not specifically respond to the licensee's alternative labor force request. We do so herein and find the showing for such a request to be insufficient to support the use of an alternative labor force.

20. In *Application of National Capital Christian Broadcasting, Inc. For Renewal of License of Station WTKK(TV), Manassas, Virginia*, 3 FCC Rcd 1919 (1988) (*Manassas*), the Commission set out the criteria it would consider in determining whether or not to grant a request for use of an alternative labor force data: distance between a station and areas of minority population in the MSA; difficulty in commuting from those areas to the station; and result of recruitment efforts directed at the MSA minority labor force. *Id.* at 1922, n.9. The distance between the stations and the Tampa/St. Petersburg area is only 23 miles. The Commission has held previously that even 30 miles may not be a sufficient distance to justify granting an alternative labor force request. *Manassas, supra. See also Application of Group Six Communications, Inc., Licensee of Station WWOC-FM, New Jersey, for Renewal of License*, 7 FCC Rcd 1815 (1992). In addition, although the licensee stated that its minority recruitment had been fruitless, it provided little evidence that it had made efforts to recruit in areas with high minority labor forces.

21. Third, we find Pasco's argument regarding its self-assessment to be inadequate. Pasco argues that the fact that it did not keep records of every applicant for every position during the entire license term does not mean that it did not periodically self-assess and modify its EEO program to try and improve its minority applicant pool. We disagree. Pasco did not have the applicant pool or recruit-

[1] *See* Stations WSBY(AM)/WQHQ(FM), 4 FCC Rcd 6160 (1989) (Stations received reporting conditions, short term renewal and a $15,000 forfeiture); Station WRGI(FM), 4 FCC Rcd 3463 (1989) (Station received reporting conditions); Station KVII-TV, 4 FCC RCd 6685 (1989) (Station received reporting conditions); Station WTCB(FM), 5 FCC Rcd 579 (1990) (Station received reporting conditions and a $10,000 forfeiture); Stations WOOJ(AM)/WOOJ-FM, 4 FCC Rcd 6178 (1989) (Stations received reporting conditions and a $15,000 forfeiture); and Station WOWW(FM), 5 FCC Rcd 191 (1989) (Station received reporting conditions and an $18,000 forfeiture).

ment data for 40 positions -- over two-thirds of the vacancies that occurred during the period under review. As we stated in *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television*, 4 FCC Rcd 1715 (1989) (*NAB Report and Order)*, it is unclear how a licensee could possibly assess "whether a sufficient number of qualified women and minorities were applying for available positions if the licensee had no idea as to how many, if any, women and minorities were applying for such positions." *Id.* at 1716. Moreover, without documentation of efforts, it is unclear how the licensee can corroborate that assessment and modification of its EEO program occurred. The collection of applicant flow data "merely allows us to more accurately assess a licensee's EEO efforts and verify that the means for self-assessment actually existed as reflected in the EEO data." *Id.* Moreover, even if, as the licensee claims, it was able to determine without records that it was not getting enough Black applicants and did periodically update and modify its EEO program, it is obvious from the results of these efforts that its attempts at modification were unsuccessful.

22. Finally, we disagree with Pasco's contention that the sanctions it received from the Commission were more severe than those imposed on similarly situated stations. Pasco inappropriately focuses on limited aspects of the EEO records of Stations WOWW(FM), WSBY(AM)/WQHQ(FM), WOOJ(AM)/WOOJ-FM, WTCB(FM), WRGI(FM) and KVII-TV, rather than studying the records as a whole.[2] Contrary to its contentions, Pasco's EEO efforts and those of the other cited stations differed significantly, thus warranting different sanctions and remedies. The licensee of WOWW(FM) had fewer hires, hired a significant number of minorities and employed minorities throughout the license term. The licensee of WSBY(AM)/WQHQ(FM) contacted minority recruitment sources for specific vacancies for almost half of its hiring opportunities. The licensee of WOOJ(AM)/WOOJ-FM attempted to recruit minorities several times during the license term, had significantly fewer hiring opportunities in an area with a smaller minority labor force and hired a member of that area's dominant minority group during the license term. The licensee of WTCB(FM) recruited for over half of its vacancies and employed minorities throughout the license term. The licensee of WRGI(FM) had a third the number of hiring opportunities and expanded its list of recruitment sources in the last year of the license term. Finally, the licensee of KVII-TV kept records of its EEO efforts, had less than a third of the number of hiring opportunities and hired and employed members of the subject area's dominant minority group throughout the license term.

23. Upon review of the licensee's petition for reconsideration, the NAACP's opposition and the licensee's reply, we find that reconsideration is not appropriate here. The licensee failed to show additional facts not known or not existing until after the licensee's last opportunity to present such facts. In addition, although it argued material error in *Miami*, we did not find its arguments persuasive. Accordingly, the licensee's petition for reconsideration is denied.

III. CONCLUSION

24. We note that the factors which the Commission takes into account when determining the amount of a forfeiture penalty include the nature, circumstances, extent and gravity of the violations and, with regard to the violator, the degree of culpability, any history of prior offenses, ability to pay and such other factors as justice may require. 47 C.F.R. Section 1.80(b)(4). After consideration of all these factors and taking into account the arguments put forth in the NAACP's and the licensee's petition, as addressed above, we find the original *Order* imposing a forfeiture of $18,000, short term renewal and reporting conditions is appropriate.

IV. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by the NAACP against WLVU(AM)/WLVU-FM IS DENIED.

26. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Pasco Pinellas Broadcasting Company IS DENIED and, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Pasco Pinellas Broadcasting Company FORFEIT to the United States the sum of eighteen thousand dollars ($18,000) for failing to comply with the Commission's Affirmative Action Rule. 47 C.F.R. Section 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R Section 1.80 and Section 504(a) of the Communications Act, as amended, 47 U.S.C. Section 504(a), as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[2] We disagree with Pasco's contention that the Commission failed to apply a consistent standard of review and therefore should reconsider its decision in this case, renew the stations for a full term and reduce or eliminate the $18,000 forfeiture. As we stated in *License Renewal Application of Congaree Broadcasters, Inc. for Station WSCQ-FM, West Columbia, South Carolina*, 5 FCC Rcd 7691 n.6 (1990), in all our decisions, "we focus on the licensee's efforts to recruit, employ and promote women *and* minorities and the licensee's ongoing assessment of its EEO efforts." Factors that we consider in our analysis "include, but are not limited to, the EEO renewal program, the number of full-time hiring opportunities and the efforts made to fill those vacancies, documentation of those efforts, the licensee's assessment of those efforts, the length of the licensee's tenure and the employment profile during the license term." *Id. See License Renewal Application of Eastern Carolina Broadcasting Company, Inc., Former Licensee of Stations WGBR(AM)/WKTC(FM) Goldsboro, North Carolina*, 6 FCC Rcd 6154 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

FULTON COUNTY SCHOOLS
Fancy Farm, KY — File No. BPLIF-910710DA

EDUCATIONAL TELEVISION FOUNDATION
Paducah, KY — File No. BPLIF-911008DG

For Construction Permit and License in the Instructional Television Fixed Service on Channels G1, G2, G3, and G4

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1992; Released: January 15, 1993

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Fulton County Schools (Fulton) and Educational Television Foundation (ETV) for a construction permit and license on Channels G1-G4 in the Instructional Television Fixed Service (ITFS). Fulton proposes to serve schools located in McCracken, Fulton, Graves, Calloway, Carlisle, and Marshall Counties in Kentucky, Alexander County in Illinois, and Henry County in Tennessee. ETV proposes to serve schools located in Paducah, Kentucky.

BASIC ELIGIBILITY

2. Both Fulton and ETV are qualified to be an ITFS licensee. Fulton is a school district accredited by the Kentucky Department of Education applying within its jurisdiction to provide ITFS service to its students and to those in neighboring school districts. ETV is not a local applicant but has submitted a letter from the Acting Superintendent of the Paducah Independent Schools, stating that some of the schools under his jurisdiction would serve as receive sites and would offer ETV's proposed programming to their students. The letter also provides that two representatives of the school district would serve on a local program committee to recommend future programming for the system. Additionally, as part of their proposals, both applicants have proposed formal educational programming and are therefore qualified from a programming standpoint.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant in selecting which applicant would be best qualified to provide the service for which the ITFS spectrum has been established. *ITFS Second Report and Order in MM Docket No. 83-523*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdiction. Third, two points are awarded to applicants whose requests would result in the acquisition by that applicant of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[2] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Fulton and ETV are each awarded points based on the following criteria:

Localism. Fulton is entitled to four points because it is a school district having at least one receive site within its district. ETV, however, is located in Bakersfield, California, and has no indicia of being local to the Paducah area. Therefore, ETV is not entitled to any points under this measure.

Accreditation. Fulton is entitled to three points for being accredited by the Kentucky Department of Education. Because ETV is not an accredited educational institution, school board, or school district, it is not entitled to any points under this measure.[3]

Four-Channel Limitation. Neither of the applicants is the licensee of other ITFS facilities or is applying for additional channels other than the ones requested in

[1] A "local" applicant generally is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order, supra* at p. 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

[3] Despite the fact that ETV is not an accredited educational institution, school board, or school district, it has nevertheless demonstrated that it has an educational purpose and has submitted a letter of assurance from the Paducah Independent Schools for use of its schools as receive sites. Therefore, in accordance with Section 74.932(a)(4) of our Rules, ETV is basically eligible to apply for ITFS facilities.

the instant applications. Consequently, both applicants are entitled to two points for remaining within the four-channel limitation.

Amount of Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid". Where amounts and types of programming proposed in an applicant's illustrative program schedule and in its programming grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits such a level of programming. Question 5 of Section IV of FCC Form 330 requires applicants to indicate which of its educational programming will be for academic credit. Because Fulton has not so indicated on its illustrative schedule, its per channel weekly average of 19.4 hours of educational programming will be considered as non-formal. *Valley View Independent School District,* 7 FCC Rcd 7228 (1992). In contrast, Fulton's program grid proposes four hours of formal educational programming per channel per week. While there are inconsistencies in the types of programming proposed, none of the amounts of programming reported reaches the threshold at which merit points are awarded. Consequently, Fulton is entitled to no programming merit points.

ETV's illustrative schedule indicates that 20 hours of educational programming will be offered on each channel each week, but ETV has not indicated any programs on its schedule that would be for academic credit. Consequently, its educational programming will also be considered as non-formal. In contrast, ETV's program grid proposes four hours of formal educational programming per week. While there are inconsistencies in the types of programming proposed, none of the amounts of programming reported reaches the threshold at which merit points are awarded. Consequently, ETV is entitled to no programming merit points.

E- and F-Channel Group Relocations. Neither of the applicants is the current licensee of E or F channels seeking to relocate to other channels. Consequently, this factor is inapplicable here.

5. Fulton is entitled to points for being local, being accredited, and for observing the four-channel limitation, for a total of nine points. ETV is entitled to only two points for observing the four-channel limitation. Thus, the selectee is Fulton.

OTHER MATTERS

6. Fulton proposes to lease its excess capacity for non-ITFS use, as permitted by Section 74.931 of the Commission's Rules (47 C.F.R. Section 74.931), to Ruralvision Central, Inc. Fulton has submitted a copy of the lease, which conforms in all respects with the Commission's requirements. Consequently, we find that Fulton is qualified to be a Commission licensee and that grant of its application would be in the public interest, convenience, and necessity.

7. Accordingly, IT IS ORDERED, That the above-captioned application of Educational Television Foundation IS DENIED, and the above-captioned application of the Fulton County Schools IS GRANTED.

8. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

GONZALES INDEPENDENT SCHOOL DISTRICT
Gonzales, TX — File No. BPLIF-911008EC

NIXON-SMILEY CONSOLIDATED INDEPENDENT SCHOOL DISTRICT
Waelder, TX — File No. BPLIF-920103DQ

For Construction Permit and License in the Instructional Television Fixed Service on Channels G1, G2, G3 and G4

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1992; Released: January 15, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Gonzales Independent School District (Gonzales) and Nixon-Smiley Consolidated Independent School District (Nixon-Smiley), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels G1-G4 in the Gonzales, Texas area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Gonzales and Nixon-Smiley. Both applicants are qualified to be ITFS licensees. They are governmental organizations engaged in the formal education of enrolled students, and they are accredited by the Texas Education Agency. Although they both propose to serve students outside their districts, because they also propose to serve schools within their own districts, they qualify as local applicants.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Gonzales and Nixon-Smiley are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant, accredited by the Texas Education Agency, is entitled to three points for accreditation.

Four-Channel Limitation. Neither Gonzales nor Nixon-Smiley is the licensee of, or has filed applications for, additional ITFS channels in the Gonzales, Texas area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 F.C.C. Rcd 5924 (1992). Both Gonzales' illustrative schedule

[1] A "local" applicant generally is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

and programming grid propose an average of 22 hours of formal educational programming per channel per week. Thus, Gonzales is entitled to one programming merit point.

The illustrative schedule for Nixon-Smiley proposes an average of 24.375 hours of ITFS programming per channel per week. Because the schedule does not indicate which ITFS programs are formal, or those to be delivered to enrolled students for credit, as requested in Question 5, Section IV of the application, we will consider the programming on Nixon-Smiley's schedule as non-formal for the purpose of determining merit points. *Valley View Independent School District*, 7 F.C.C. Rcd 7228 (1992). In contrast, its programming grid proposes an average of four hours of formal educational programming per channel per week.[3] Because neither the schedule nor the grid establishes the threshold amount at which merit points are awarded, Nixon-Smiley is entitled to no programming merit points.

E- and F- Channel Group Relocation. Neither Gonzales nor Nixon-Smiley is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Gonzales is entitled to points for being local, for being accredited, for observing the four-channel limitation, and for proposing at least 21 hours of formal educational programming, for a total of 10 points. Nixon-Smiley is entitled to points for being local, for being accredited, and for observing the four-channel limitation, for a total of nine points. Thus, the selectee is Gonzales.

OTHER MATTERS

5. Gonzales proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, to Guadalupe Valley Electric Cooperative, Inc. However, it has not yet submitted a copy of its lease agreement, a prerequisite of obtaining a license. *Second Report and Order*, 101 F.C.C. 2d at 91. Accordingly, the authorization of Gonzales will be conditioned upon submission of a lease agreement which complies with the Commission's rules. Additionally, there are no petitions to deny the application of Gonzales. We find that Gonzales is qualified to be a Commission licensee and that grant of its application would serve the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED, That the application of Gonzales Independent School District (BPLIF-911008EC) IS GRANTED, subject to the condition that within 30 days from the date of this Order, Gonzales submits to the Chief, Mass Media Bureau for approval information demonstrating compliance with Commission requirements, including, if appropriate, a copy of the lease agreement. The application of Nixon-Smiley Consolidated Independent School District (BPLIF-920103DQ) IS DENIED.

7. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] Nixon-Smiley's programming grid, which represents that there will be at least some formal educational programming, is sufficient to satisfy the programming requirements of Section 74.931(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RUSH SPRINGS PUBLIC SCHOOLS
Lindsay, OK — File No. BPLIF-920109DX

PERNELL HIGH SCHOOL
Lindsay, OK — File No. BPLIF-911011DJ

For Construction Permit and License in the Instructional Television Fixed Service on Channels B1, B2, B3, and B4

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1992; Released: January 15, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Rush Springs Public Schools ("Rush") and Pernell High School ("Pernell"), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels B1-B4 in the area of Lindsay, Oklahoma.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Rush and Pernell. Rush is qualified to be an ITFS licensee. It is a school district which governs schools engaged in the formal education of enrolled students, and it is accredited by the Oklahoma State Department of Education. Although Rush proposes to serve students outside its district, because it also proposes to serve schools within its own district, it qualifies as a local applicant.[1] Pernell, a high school engaged in the formal education of enrolled students and accredited by the Oklahoma State Department of Education, is also a qualified ITFS applicant. Pernell proposes to serve its own students and is therefore a local applicant, even though it proposes to serve students outside its jurisdiction.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 FCC2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[2] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[3] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Rush and Pernell are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant, accredited by the Oklahoma State Department of Education, is entitled to three points for accreditation.

Four-Channel Limitation. Neither Rush nor Pernell is the licensee of, or has filed applications for, additional ITFS channels in the Lindsay, Oklahoma area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Rush's illustrative schedule indicates an average of 25 hours of formal educational programming per channel per week, and its programming grid indicates the same. Thus, Rush is deemed to have proposed an average of 25 hours of formal educational programming per channel per week, and is entitled to one programming merit point.

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[1] An applicant need not submit letters of intended use from receive sites within its own jurisdiction in order to achieve eligibility or to include students from those sites in its enrollment figures in the event of a tie resulting from the mutually exclusive selection procedure.

[2] A "local" applicant is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 FCC2d at 59; 47 C.F.R. §74.932, Note 1.

[3] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of total ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Pernell's illustrative schedule proposes an average of 24.375 hours of ITFS programming per channel per week. However, the schedule does not indicate which programs are formal educational, as required by Section IV, Question 5 of the application. Accordingly, we will treat this programming as non-formal for the purposes of determining merit points. *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). Further, its programming grid proposes an average of 4 hours of formal educational programming per channel per week.[4] Because neither amount reaches the threshold at which merit points are awarded, Pernell is entitled to no programming merit points.

E- and F- Channel Group Relocation. Neither Rush nor Pernell is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Rush is entitled to points for being local, for being accredited, for proposing at least 21 hours of formal educational programming and for observing the four-channel limitation, for a total of 10 points. Pernell is entitled to points for being local, for being accredited, and for observing the four-channel limitation, for a total of nine points. Thus, the selectee is Rush.

OTHER MATTERS

5. Rush proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931and will submit a copy of its lease with Rural Electric Cooperative upon completion of negotiations. Accordingly, the authorization of Rush will be conditioned upon submission of a lease agreement which complies with the Commission's rules. Additionally, there are no petitions to deny Rush's application, and we find Rush to be fully qualified and that a grant of Rush's application will serve the public interest, convenience, and necessity.

6. Accordingly, IT IS ORDERED, That the application of Pernell High School (BPLIF-911011DJ) IS DENIED, and the application of Rush Springs Public Schools (BPLIF-920109DX) IS GRANTED, subject to the condition that within 30 days of the release of this Order Rush submits to the Chief, Distribution Services Branch for approval information demonstrating compliance with Commission requirements, including, if appropriate, a copy of the lease agreement.

7. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[4] Even assuming the the entry "4" signifies four hours per channel per day, or twenty hours per channel per week, the inconsistency still indicates our awarding no merit points to Pernell. Since the grid does propose some formal educational programming, however, Pernell does not lack the basic programming qualification of Section 74.931(a) of our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

DECATUR INDEPENDENT SCHOOL DISTRICT
Bowie, TX — File No. BPLIF-911008DS

MARIETTA PUBLIC SCHOOLS
Saint Jo, TX — File No. BPLIF-911007DC

MONTAGUE INDEPENDENT SCHOOL DISTRICT
Rosston, TX — File No. BPLIF-910604DC

For Construction Permit
and License in the Instructional
Television Fixed Service on
Channels A1, A2, A3, and A4

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1992; Released: January 19, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Decatur Independent School District ("Decatur"), Marietta Public Schools ("Marietta"), and Montague Independent School District ("Montague"), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels A1-A4 in the area of Bowie, St. Jo, and Rosston, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Decatur, Marietta, and Montague. All three applicants are qualified to be ITFS licensees. They are governmental organizations engaged in the formal education of enrolled students, and they are accredited by their respective state education agencies: Marietta is accredited by the Oklahoma State Department of Education, and Montague and Decatur are accredited by the Texas Education Agency. Although they all propose to serve students outside their districts, because they also propose to provide formal educational programming to schools within their own districts, they qualify as local applicants.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards predetermined merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Decatur, Marietta, and Montague are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its jurisdiction.

Accreditation. Decatur and Montague are accredited by the Texas Education Agency and Marietta by the Oklahoma State Education Agency. Consequently, all three are entitled to three points for accreditation.

Four-Channel Limitation. None of the applicants is the licensee of or has filed applications for additional ITFS channels in the Bowie, Saint Jo, or Rosston areas. Therefore, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where amounts and types of pro-

[1] A "local" applicant is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

gramming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.* 7 FCC Rcd 5924 (1992). Decatur's illustrative schedule proposes an average of 20 hours ITFS programming per channel per week. Because the schedule does not indicate which ITFS programs are formal, or those to be delivered to enrolled students for credit, as requested in Question 5, Section IV of the application, we will consider the programming on Decatur's schedule as non-formal for the purposes of determining merit points. *Valley View Independent School District,* 7 FCC Rcd 7228 (1992). In contrast, its programming grid proposes an average of 20 hours of formal educational programming per channel per week. Because neither the schedule nor the grid establishes the threshold amount at which merit points are awarded, Decatur is entitled to no programming merit points.

The illustrative schedule for Marietta proposes an average of 16 hours of ITFS programming per channel per week. As with Decatur, Marietta's schedule does not indicate which programs are formal educational. In contrast, its programming grid proposes an average of 16.75 hours of formal educational programming per channel per week. Because neither the schedule nor the grid reach the threshold amount at which merit points are awarded, Marietta is entitled to no programming merit points.

Montague's illustrative schedule proposes an average of 24.375 hours of ITFS programming, but once again, the schedule does not indicate which programs are formal educational. Accordingly, we will consider the programming on Montague's schedule as nonformal. *Valley View Independent School District, supra.* Its programming grid proposes an average of 20 hours of formal educational programming per channel per week. Because neither the schedule nor the grid reaches the threshold at which merit points are awarded, Montague is entitled to no programming merit points.

E- and F- Channel Group Relocations. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels; therefore, none is entitled to the one point for such applicants.

Total. Decatur, Marietta, and Montague are each entitled to a total of nine points: four points for being local, three points for being accredited, and two points for observing the four-channel limitation. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523,* ("*Third Report and Order*"), 4 FCC Rcd 4830 (1989), *Third Report and Order Reconsidered,* 5 FCC Rcd 945 (1990), ("*Third Report Recon.*") and Section 74.913(d) of the Commission's Rules. This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[3] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches fewer than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the three applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. Although Marietta and Montague included with their enrollment figures letters of intended use from receive sites outside of their jurisdictions, we cannot count the students from those sites because such letters must be filed prior to the "B" cut-off date of December 30, 1991.[4] Similarly, Decatur submitted four similar receive site letters with its application, but none of these conforms to the requirements of Section 74.932 n.2 of our rules. Further, Decatur included receive site letters with an amendment dated February 3, 1992, which is likewise beyond the cut-off date.[5] Consequently, for each applicant we will count enrolled students only at schools listed as receive sites that are within the applicants' respective jurisdictions. Accordingly, we credit Marietta with 889 students, Montague with 87 students, and Decatur with 1684 students. Because the 87 students credited to Montague and the 889 credited to Marietta are fewer than 80 percent of the total credited to Decatur, Montague's and Marietta's applications will be denied, and Decatur will be authorized to operate facilities on channels A1-A4.

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[3] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report Recon., supra.* Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. §74.911(c); *Third Report and Order,* 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. §74.932, Note 2.

[4] Marietta and Montague filed their letters on April 24, 1992 and April 27, 1992, respectively.

[5] The letters contained in the amendment, further, do not contain all of the information required by our rules.

OTHER MATTERS

7. Decatur proposes to lease its excess capacity for non-ITFS use, as permitted by Section 74.931. Decatur has submitted a copy of its lease with Wise Electric Cooperative, Inc. which accords in all respects with our requirements. Finally, there are no petitions to deny the application of Decatur, and we find this applicant to be fully qualified.

8. Accordingly, IT IS ORDERED, That the application of Decatur Independent School District (BPLIF-911008DS) IS GRANTED for channels A1-A4, the application of Marietta Public Schools (BPLIF-911007DC) IS DENIED, and the application of Montague Independent School District (BPLIF-910604DC) IS DENIED.

9. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 6, 1993

Released: January 15, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Tampa Bay Television, Inc. 1800C1-MD
Licensee, WFTS-TV, Tampa, FL 92070062
4501 E. Columbus Drive
Tampa, FL 33605

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On Thursday, January 16, 1992, Television Station WFTS-TV broadcast a children's program which appeared to exceed the limits of 12 minutes of commercial time per hour on weekdays. 47 C.F.R. § 73.670. Specifically, the 6:30 a.m. broadcast of "GI Joe" contained two advertisements for GI Joe toys featuring GI Joe figures. The 30-minute program thus appeared, by virtue of its association with a product sold during commercial breaks in that program, to be a "children's program length commercial," as defined in our *Report and Order*, 6 FCC Rcd 2111, 2118 (1991). In such case, the entire program would count as commercial time.

In response to our letter of inquiry, you state, by letter dated July 2, 1992, that such placement was the result of an oversight which the station discovered and corrected early in February, prior to our investigation. You describe further corrective actions and policies implemented by the station to ensure strict compliance in the future.

In view of the above, and from the documents attached to your submission, it appears that between January 16, 1992, and February 5, 1992, Television Station WFTS-TV, Tampa, Florida, repeatedly violated 47 C.F.R. § 73.670 by airing 30 minutes of commercial time from 6:30 -7:00 a.m. -- substantially more than the 12-minute per hour limit for weekday children's programming. Accordingly, Tampa Bay Television, Inc., is hereby advised of its apparent liability for a forfeiture of ten thousand dollars ($10,000). The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 6, 1993

Released: January 15, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Bay Television, Inc. 1800C1MD
Licensee, WTTA(TV), 92070256
St. Petersburg, FL
3500 Parkdale Avenue
Baltimore, MD 21211

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

Between 3 and 5 p.m. on Thursday, January 16, 1992, Television Station WTTA, St. Petersburg, Florida, broadcast two one-hour blocks of children's programming. Each block contained more than the 12 minutes of commercials per hour allowed by 47 C.F.R. § 73.670 in weekday children's programming. Between 3 and 4 p.m. WTTA(TV) apparently aired 14.5 minutes of commercials in the cartoon programs "Inspector Gadget" and "Heathcliff." Between 4 and 5 p.m. WTTA(TV) apparently aired 13.5 minutes of commercials in the cartoon programs "Widget" and "Casper."

In your letter dated July 2, 1992, responding to our June 16, 1992, letter of inquiry, you explain that the overages were due to a misunderstanding of our children's commercialization rules by your traffic manager, who was relatively new. You state that she believed the limits applied only to local commercials, not to bartered commercials already inserted in the programming. You state that, prior to receipt of our letter, station management realized bartered commercials were not being counted toward the commercial limits and took steps to correct the situation. You submit that the violations by WTTA(TV), in operation less than a year, were inadvertent.

As licensee, you are ultimately responsible for the acts of your employees and for complying with the Commission's rules. *Triad Broadcasting Co.*, 96 FCC 2d 1235 (1984). In view of the above, it appears that, at least twice on January 16, 1992, and on various other days until you corrected your faulty counting procedures, WTTA(TV), St. Petersburg, Florida, repeatedly violated 47 C.F.R. § 73.670 by airing commercials in excess of the 12 minutes per hour allowed in weekday children's programming. Accordingly, Bay Television, Inc., is hereby advised of its apparent liability for a forfeiture of ten thousand dollars ($10,000). The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

B.F. Investments, Inc. File Nos. 1418-CM-P-83

For Authority to Construct
and Operate a Multichannel
Multipoint Distribution
Service station on the F-group
channels at Kalamazoo, Michigan

ORDER ON RECONSIDERATION

Adopted: January 11, 1993; Released: January 15, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* After the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Kalamazoo, Michigan, B.F. Investments, Inc. (Investments) requested reinstatement of its application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated qualification review of this application, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Investments was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Investments was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In the deficiency letter, Investments was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Investments provided none of the information necessary to complete processing of its application prior to the date of dismissal. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d), the Division dismissed Investments' application for failure to comply completely in a timely manner with the Division's request for information. Although acknowledging that it had failed to submit requested information, Investments requests that its application be reinstated because it had advised the Division prior to dismissal that: (1) it would not provide an update financial demonstration, but would rely on an 1983 bank letter; and (2) it refused to provide a lease or lease option agreement, or an ITFS interference study at the time the lease or lease option agreement and analysis were requested.

4. *Discussion.* Investments failed to file its reinstatement request within 30 days of the dismissal action, or public notice of the dismissal, as required by Section 405 of the Communications Act and Section 1.106(f). Because the deadline for filing reconsideration petitions is prescribed by statute, the Commission may not ordinarily waive or extend the filing period. *Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1986); *Metromedia, Inc.*, 56 FCC 2d 909 (1975); *Multi-Point Television Distributors, Inc.*, 5 FCC 2d 519, 520 (Comm. Car. Bur. 1990); *Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). Due to Investments' failure to comply with this filing deadline, its reinstatement request is properly dismissed.

5. *Conclusion and Ordering Clause.* Accordingly, IT IS ORDERED that the reinstatement request of B.F. Investments, Inc. for its above-referenced MMDS application IS DISMISSED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; and (3) an Instructional Television Fixed Service (ITFS) interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

B.F. Investments, Inc. File No. 1474-CM-P-83

For Authority to Construct
and Operate a Multichannel
Multipoint Distribution
Service station on the F-group
channels at Poughkeepsie, New York

ORDER ON RECONSIDERATION

Adopted: January 11, 1993; Released: January 15, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* After the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Poughkeepsie, New York, B.F. Investments, Inc. (Investments) requested reinstatement of its application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated qualification review of the application, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Investments was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Investments was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In the deficiency letter, Investments was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Investments provided none of the information necessary to complete processing of its application, except for FAA information. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d), the Division dismissed Investments' application for failure to comply completely in a timely manner with the Division's request for information. Although acknowledging that it had failed to submit requested information, Investments requests that its application be reinstated because it had filed a lease option agreement and financial certification after its application was dismissed.

4. *Discussion.* As of the date of the Division's dismissal action, Investments still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Investments had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site, as required by Sec. 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3]

5. In addition, Investments failed to submit the requested current financial qualification data prior to dismissal.[4] *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). At the time Investments submitted its 1983 bank letter, Section 21.17(e) required that a bank financing letter must provide loan details including a letter committing the bank to making the loan. Investments' letter lacked a commitment because it was contingent upon Investments meeting credit qualification criteria at some future point in time, with the qualification criteria to be determined at that future time.

6. Also, Investments failed to comply with the request to submit the Section 21.902(i) ITFS interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Investments failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

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[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (3) an Instructional Television Fixed Service (ITFS) interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i); and (4) correct antenna structure height information for Federal Aviation Administration (FAA) air navigation hazard program compliance, as required by 47 C.F.R. Secs. 17.4(f) and 21.15(d).

[2] Even if Investments was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

[4] Even if Investments was not required to comply with the requirements of Section 21.17, it was required pursuant to Section 21.13(c) to submit it after the Division directed it to do so.

7. Investments had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *Vision-Aire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for 28 months substantially impeded the expeditious offering of MMDS at Poughkeepsie. Also, Investments' failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Investments had not provided the required interference analysis, the required current financial qualification data, and the required lease or lease option agreement. The Division was not in a position, therefore, to complete evaluation of Investments' MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

8. *Conclusion and Ordering Clause*. Having carefully considered all of the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's request for information was proper, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the request for reinstatement filed by B.F. Investments, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-257

In the Matter of

Amendment of the Commission's Rules
Concerning Maritime Communications

ORDER

Adopted: January 11, 1993; Released: January 15, 1993

By the Chief, Special Services Division

1. On November 5, 1992, the Commission adopted a *Notice of Proposed Rule Making* and *Notice of Inquiry*, hereafter *Notice*, in the above captioned matter. The specified filing deadlines for comments and reply comments are January 21, 1993, and February 5, 1993, respectively.

2. On December 10, 1992, the United States Coast Guard (Coast Guard) filed a motion requesting an extension of time in which to file comments. Additionally, on January 4, 1993, the Radio Technical Commission for Maritime Services (RTCM) filed a motion asking for an extension of time in this proceeding. The Coast Guard states that the issues raised in the *Notice* are substantial and will require a significant amount of research. It requests an extension of time to coincide with the annual RTCM assembly meeting to permit the issues raised in the *Notice* to be discussed fully by members of the maritime community. The RTCM notes that its annual assembly meeting will take place during the week of May 2, 1993, and that the affected marine community will be substantially represented at the meeting. RTCM states that it has over 150 members and that virtually all of them will be affected by the issues raised in the *Notice*. The RTCM contends that an extension of time will permit it to coordinate responses more effectively with members of the maritime community and will result in meaningful comments. Both the Coast Guard and the RTCM emphasize that extending the comment date will permit members of the maritime community outside of Washington, D.C. to be represented on the issues raised in the *Notice*.

3. The RTCM is a non-profit organization whose objectives include studying and preparing reports on maritime telecommunications practices, needs and technologies to, among other things, improve the efficiency and capability of marine communications. The Coast Guard is responsible for search and rescue operations including many ships voluntarily equipped with radio equipment. We find good cause to grant the extension of time requested by the Coast Guard and RTCM. Such an extension of time will permit the full participation in this proceeding by a broad segment of the affected marine community.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Sections 0.331 and 1.46 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.46, that the Coast Guard's and the RTCM's motions for extensions of time IS GRANTED. The filing deadlines for comments and reply comments are extended to **June 1, 1993** and **July 15, 1993**, respectively.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Application of Gulf-California Broadcast Company For Station KESQ-TV Palm Springs, California — File No. BRCT-880729KI

MEMORANDUM OPINION AND ORDER AND NOTICE OF FORFEITURE

Adopted: January 6, 1993; Released: January 19, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration a Petition for Reconsideration timely filed on May 31, 1991, by Gulf-California Broadcast Company (Gulf-California) requesting cancellation of the Notice of Apparent Liability (NAL) issued to Gulf-California, licensee of KESQ-TV, in *Applications of Certain Television Stations Serving Communities in the State of California*, 6 FCC Rcd 2340 (1991) (*California*). In *California*, we concluded that the licensee's failure to comply with the Commission's EEO Rule warranted a renewal subject to reporting conditions and a Notice of Apparent Liability in the amount of $5,000.[1] *See* 47 C.F.R. Section 73.2080.

II. BACKGROUND

2. Our decision in *California* describes the licensee's failure to engage in adequate EEO efforts. Review of the licensee's renewal application, opposition to petition to deny and inquiry response revealed that it failed to self-assess its EEO program meaningfully and failed to interview or hire minorities in significant numbers despite its location in a 23.8% minority labor force area. Specifically, the Commission found that the licensee used minority-oriented recruitment sources for 37 out of 70 overall hiring opportunities and 34 out of 56 upper-level hiring opportunities, with largely unproductive results. The licensee interviewed only 13 minority applicants out of 206 total interviewees and interviewed 10 minority applicants out of 161 interviewees for upper-level positions. Despite the large minority presence in the labor force, (4.2% Black, 17.0% Hispanic, 2.6% Other), the Annual Employment Reports revealed that the licensee employed only one Hispanic out of 39 employees in 1986 and 1988, no Hispanics in 1985, no Hispanics in 1987, and no Hispanics in upper-level positions until 1988. Of its hires over the license term, eight were minority applicants (six Hispanic, two Asian) overall, with four Hispanics and both Asians hired for upper-level positions.

III. PLEADINGS

3. In support of its Petition for Reconsideration, Gulf-California makes several arguments. First, it states that the Commission erred in analyzing its recruitment efforts. It claims that two sources, the Indio, California Employment Development Office and the *Indio Daily News*, are "entities or organizations likely to result in minority contact" but were not properly considered by the Commission. Moreover, the licensee claims that the Commission failed to consider its explanation for four of the five openings for which it did not recruit.[2] It further states that the Commission erred by finding that it failed to recruit publicly for six positions when it actually failed to recruit for five.

4. Second, the licensee argues that the Commission wrongly relied on the licensee's Annual Employment Reports to analyze its employment history. It states that, in its opposition, it showed that it employed one Hispanic full-time in 1985, three in 1986, one in 1987, and two in 1988.

5. Third, Gulf-California argues that the Commission erred in rejecting its request for permission to use an alternative labor force. The licensee argues that the appropriate labor force for its station is the 500 square miles surrounding Cathedral City, California, in which it claims almost all of its employees reside. The licensee argues that it made the necessary showings to justify an alternative labor force request but that the Commission dismissed them without analysis. It also argues that the Commission erred in stating that the licensee failed to recruit in minority population centers because, as the licensee stated in its inquiry response, it recruited in Indio, California, which the licensee states has a population that is more than 50% Hispanic.

6. Fourth, the licensee argues that Census data quoted in its opposition show that few minorities in its MSA possess the skills necessary for upper-level positions at its station, which comprised 57 of its 70 hires. The data quoted indicate that minorities comprise 4.4% of the Riverside County, California labor force employed in upper-level job categories. The licensee then argues, based on this information, that 4.4% of its area's labor force consists of minorities "qualified" for upper-level positions in broadcasting.

7. Finally, the licensee states that it "constantly" adds new minority-oriented recruitment sources and follows up with the sources if they are unproductive. For all of the above reasons, the licensee argues that its NAL should be cancelled.

IV. DISCUSSION

8. Reconsideration is appropriate where the petitioner shows either a material error or omission or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain*

[1] The licensee does not challenge the imposition of reporting conditions.

[2] In its petition, the licensee again states that "four of those five hires, where no recruitment sources were used, were new job positions for an existing employee whose particular skills or interests made creation of the job in question for that person particularly appropriate."

Journal Co. v FCC, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied* 383 U.S. 967 (1966); 47 C.F.R. Section 1.106(c). The factors that the Commission takes into account when determining the amount of a forfeiture penalty include "the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 C.F.R. Section 1.80(b)(4). Applying these standards, reconsideration of *California* is not appropriate as discussed below.

9. First, the licensee's contention that the Commission failed to properly evaluate its use of recruitment sources is without merit. The Commission did not consider the *Indio Daily News* or Indio Employment agency as minority-specific sources or potential sources of minority applicants because the licensee never provided evidence that they are such. The licensee merely indicated that the sources are located in an area with a high minority population -- not that these were sources with significant contact with the minority community. *See* 47 C.F.R. Section 73.2080(c)(2). More importantly, the licensee does not contradict the Commission's finding that it used largely unproductive sources repeatedly during the period under review. As we stated in an earlier case, a licensee will not be faulted for failing to contact minority-specific sources if it obtains a meaningful pool of minority referrals and applicants from exclusive reliance on general sources, but questions will be raised if minority-specific sources are not used and general sources are unproductive. *See Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704, 1709 n.8 (1990). Given the above, the licensee has failed to establish that our analysis and treatment of its recruitment efforts were erroneous.

10. The licensee correctly argues that the Commission failed to acknowledge the licensee's explanation for why it did not recruit for some positions. It also correctly argues that the Commission was mistaken in stating that the licensee failed to recruit for six positions. However, according to the licensee's own hiring chart submitted in its opposition to the petition to deny, it failed to recruit for three full-time positions. Regardless, the fact that the licensee was able to explain why it failed to recruit in four cases (one of which was for a part-time position) does not show that the Commission made a material error in finding that the licensee's overall EEO performance (*see* paragraph 2, *supra)* failed to comply with our EEO rule. Accordingly, we affirm the finding regarding overall EEO performance.

11. Next, we also find without merit the licensee's allegation that the Commission improperly reviewed the station's profile in light of its annual employment reports and, thus, undercounted Hispanic employees by failing to consider those not reflected on the reports. Although the Commission noted in *California* that the employment reports reflected Hispanic employees only in 1986 (one) and 1988 (one), the Commission also indicated that the licensee hired six Hispanics and two other minorities during the term. Thus, the Commission properly considered the Hispanic and other minority employees hired by the licensee during the term, including those not reflected on the annual employment reports.

12. We also find the alternative labor force argument without merit. The licensee misreads the Commission's rationale for not granting the alternative labor force request. *California* does not state that the licensee failed to recruit in minority population centers, as the licensee suggests. *California* states that the licensee "failed to document that it made best efforts directed at the minority labor center in its MSA and that such efforts proved fruitless." *California* at 2345 n.17. Without such documentation, use of alternative labor force figures is unwarranted. The licensee's documentation of efforts directed at an Hispanic population center in the MSA consisted of contacts with only two general sources in that location which produced few minority referrals even though the general sources were contacted for most openings. This is not an adequate showing of best efforts to reach potential minority applicants in the entire MSA sufficient to warrant approval of the request for a more restricted recruitment area. As we stated previously, use of alternative labor force data may be appropriate if a licensee documents that it engaged in "extensive recruitment involving use of minority referral sources" from areas of minority concentration in the MSA and that those efforts proved fruitless. *Application of National Capital Christian Broadcasting, Inc. for Renewal of License of Station WTKK(TV), Manassas, Virginia*, 3 FCC Rcd 1919, 1920 (1988). Use of two general sources that were largely ineffective in producing minority referrals does not constitute "extensive recruitment" sufficient to warrant use of alternative labor force figures.

13. Next, we find without merit the licensee's argument that the forfeiture should be cancelled because the MSA allegedly contains few minorities qualified for upper-level positions in broadcasting. During the license term, the licensee hired four Hispanics and two other minorities for upper-level positions. Thus, minorities believed by the licensee to be qualified for upper-level broadcasting jobs are present in the labor force. The licensee's data reflect the percentage of minorities among total employees in upper-level positions in the Riverside County labor force. The licensee is required to recruit from both Riverside and San Bernardino Counties, however, and the licensee failed to cite data from San Bernardino County, California. Moreover, data provided to the Commission from the Equal Employment Opportunity Commission show that Hispanics in the Riverside/San Bernardino MSA comprise between 8.1% to 10.7% of upper-level positions and Blacks comprise between 2.5% and 5.0% of the same positions. In addition, the licensee's implication that only people already employed in upper-level positions are qualified for such positions is without merit. People may have skills and qualifications for upper-level positions if they obtain adequate training or employment opportunities regardless of their current employment. Also, determining skills allegedly requisite for upper-level positions is subjective and may differ from station to station within the same labor force. For these reasons, the Commission declines to find that licensees should limit their upper-level recruitment efforts to those in the labor force who are already employed in upper-level broadcasting or similar positions. In addition, this argument fails to justify cancellation of the forfeiture in this case.

14. Finally, we also find without merit the licensee's argument that its changing recruitment sources justifies cancellation of the forfeiture. Changing sources can be a positive step if the new sources are selected for their potential for producing qualified minorities. The changes made by this licensee were largely unproductive. Therefore, this argument fails to meet the standard for reconsideration and does not convince us that the forfeiture should be cancelled.

IV. CONCLUSION

15. After considering the licensee's arguments and those factors used to determine the amount of a forfeiture penalty, we find that our Notice of Apparent Liability imposing a forfeiture in the amount of $5,000 was appropriate. Accordingly, we deny Gulf-California's request and issue a Notice of Forfeiture in the amount of $5,000.

V. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Gulf-California Broadcast Company IS DENIED, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Gulf-California Broadcast Company FORFEIT to the United States the sum of five thousand dollars ($5,000) for the wilful and repeated violation of Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, and Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 504(a), as summarized in the attachment to this Notice of Forfeiture.

17. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Forfeiture to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION
SERVICES, INC.,
Complainant,

v.

NYNEX CORPORATION	File No. E-90-388
and BELL COMMUNICATIONS	File No. E-90-389
RESEARCH, INC.,	
Defendants.	

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 1993; Released: January 19, 1993

By the Commission:

I. INTRODUCTION

1. Before the Commission is an Application for Review filed by Allnet Communication Services, Inc. ("Allnet"). Allnet seeks reversal of a May 18, 1990 ruling by the Chief, Formal Complaints and Investigations Branch, Common Carrier Bureau ("Bureau") which returned complaints filed by Allnet against the NYNEX Corporation ("NYNEX") and Bell Communications Research, Inc. ("Bellcore")[1] For the reasons discussed below, we deny Allnet's application for review.

II. BACKGROUND

2. On April 6, 1990, Allnet filed with the Commission formal complaints against New York Telephone Company ("NYT"), New England Telephone and Telegraph Company ("NET"), NYNEX and Bellcore, alleging unjust and unreasonable practices and charges by the defendants in violation of Sections 201 through 206 of the Communications Act ("Act")[2] . Specifically, the complaints alleged that defendants unlawfully included in their interstate rates certain lobbying and MFJ-related litigation expenses incurred by the defendants and their affiliates, and inflated investments and expenses associated with affiliate transactions. The complaints also alleged that the defendants overearned on interstate access services for the period January 1, 1987 through December 31, 1988, in violation of Section 201(b) of the Act. The Bureau accepted for filing the complaints directed against NYT and NET, but did not accept the complaints directed against NYNEX and Bellcore.

3. In returning Allnet's complaints against NYNEX and Bellcore, the Bureau concluded that Allnet had not alleged facts which would sustain a cause of action against the two companies independent of the operating companies, NYT and NET.

III. CONTENTIONS OF THE PARTIES

4. In its application for review, Allnet takes exception to the Bureau's failure to accept its complaints against NYNEX and Bellcore while entertaining claims against NYT and NET. Allnet states that its original complaints specifically alleged that NYT and NET misallocated and misappropriated interstate ratepayer funds due in large part to the unlawful practices of NYNEX and Bellcore. Therefore, Allnet claims, it is essential that NYNEX and Bellcore be included as defendants because they have firsthand knowledge of the facts surrounding these alleged practices that defendants NYT and NET do not. Allnet also contends that NYNEX and Bellcore are necessary parties for purposes of adequately conducting discovery. According to Allnet, the Bureau erred in dismissing the two complaints because Allnet's claims provided sufficient grounds to establish a cause of action pursuant to Section 208 of the Act.

5. In its opposition, NYNEX argues that the Common Carrier Bureau correctly returned Allnet's complaint. NYNEX contends that Allnet's complaint failed to allege any facts sufficient to sustain a cause of action against NYNEX. According to NYNEX, Allnet cannot sustain its complaint against NYNEX with broad allegations concerning the manner in which NYNEX invests profits derived from its business. NYNEX argues that Allnet cites no authority in its complaint or in its application for review that would support its claim that the alleged unlawful activities by NYNEX constitute a violation of Section 201(b) of the Act.

6. Bellcore argues in its opposition that the Bureau properly acknowledged that Allnet did not allege facts which would sustain a cause of action against Bellcore. Bellcore maintains that it is a privately held corporation owned by the Bell Operating Companies and that Allnet did not allege facts which, if true, would constitute a violation of the Act by Bellcore. Therefore, Bellcore contends, Allnet's application should be denied.

IV. DISCUSSION

7. We have carefully reviewed this matter and find that the Bureau properly concluded that Allnet failed to allege facts sufficient to sustain independent causes of action against NYNEX and Bellcore under Section 208 of the Act. Allnet's complaints do not contain allegations regarding the activities of NYNEX and Bellcore which, if true, would constitute violations of the Act or the Commission's Rules. Essentially, Allnet's allegations concerning NYNEX and Bellcore involve the manner in which the two entities expended profits derived from the regulated activities of NYT and NET. The manner in which holding companies

[1] *See* Letter to Roy L. Morris, Allnet Communication Services, Inc., from Gregory A. Weiss, Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau, dated May 18, 1990.
[2] 47 U.S.C. §§ 201 - 206.

invest such profits is not regulated under the Act or our rules. Because Allnet has failed to allege any facts that would establish a cause of action against NYNEX or Bellcore independent of NYT and NET, we conclude that the Bureau acted properly in returning Allnet's complaints.

8. Finally, insofar as Allnet argues that inclusion of NYNEX and Bellcore as defendants is essential to discovery and establishing a complete record, we find that Allnet has failed to articulate any legal or evidentiary basis to disturb the rationale or result of the Bureau's ruling. The Commission's rules provide parties with ample opportunity and resources to conduct thorough discovery and develop a complete record. Allnet does not contend that these rules are inadequate in these proceedings but merely argues possible consequences of excluding NYNEX and Bellcore. Such vague and contingent references are insufficient to establish independent causes of action against the companies in this context. Moreover, to the extent the Commission deems it necessary to obtain information from NYNEX or Bellcore, we remain able to do so without making them parties here.[3]

9. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), that the Application for Review filed by Allnet Communication Services, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] *See e.g.*, 47 U.S.C. §§ 218, 403, 409(e) and (f).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for Cost
Support Material to be Filed with
Open Network Architecture
Access Tariffs

Application for Review

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1992; Released: January 15, 1993

By the Commission:

1. In July 1991, the Commission adopted revisions to Part 69 of the Commission's Rules, specifying rate structure and other tariffing requirements for Bell Operating Companies (BOCs) when implementing Open Network Architecture (ONA).[1] The Commission ordered the BOCs to unbundle from their existing feature group access arrangements optional features and functions, to be called basic service elements (BSEs). These BSEs were distinguished from the underlying switching and transmission services called basic serving arrangements (BSAs). The *Part 69 ONA Order* adopted a flexible, cost-based approach to ONA pricing that requires BOCs to base rates for BSEs on direct costs plus reasonable overheads.[2] To develop BSE rates, the BOCs have employed the Switching Cost Information System (SCIS). SCIS is a computer model that translates the physical functions of switching offices into complex equations that enable its capacity and cost to be apportioned among the features and functions the switch provides.[3]

2. On September 19, 1991, the Common Carrier Bureau (Bureau) released the *ONA TRP Order*.[4] This Order required BOCs to file their SCIS models on the record.[5] Several parties petitioned for waiver of this requirement. In the *Ameritech TRP Order*, the Bureau temporarily waived the SCIS submission requirements of the *ONA TRP Order* while it examined Ameritech's SCIS model *in camera* to determine whether and to what extent SCIS could be disclosed. On December 23, 1991, the Bureau released the *SCIS In Camera Order*, concluding that SCIS employed proprietary information, in the form of pricing information supplied by switch vendors, and that Bellcore held intellectual property rights in the model. The Bureau determined that SCIS was not required to be made available on the public record under the Freedom of Information Act or Commission Rules.[6] The Bureau also ordered the other BOCs to file SCIS on an *in camera* basis, however, to determine whether public examination of some redacted portion of the SCIS model and related materials could be allowed without exposing proprietary information to public scrutiny.[7] On January 22, 1992, Allnet Communication Services, Inc. (Allnet) filed an application for review of the *SCIS In Camera Order*. For reasons set forth below, we deny Allnet's application.

3. Allnet contends the Bureau erred in finding the information in SCIS to be exempt from mandatory disclosure under Exemption 4 of the Freedom of Information Act (FOIA). Allnet asserts that proprietary pricing information from vendors cannot be derived, or "reverse-engineered," from the mathematical equations that make up the SCIS model, and therefore would not be revealed through disclosure of the model.[8] Allnet also denies that vendor pricing information is proprietary. It assumes that each BOC has access to other BOCs' negotiated switch price discounts because they have access to SCIS.[9]

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[1] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*). The Bell Operating Companies are the Ameritech Operating Companies (Ameritech); the Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company (Southwestern Bell), and US West Communications, Inc. (US West).

[2] BSAs are to be priced residually, so that the combined BSA and BSE rates are revenue neutral relative to the previously bundled feature group rates. *See Part 69 ONA Order*, 6 FCC Rcd at 4531-32, paras. 38-48.

[3] SCIS is maintained and licensed by Bell Communications Research (Bellcore). One of the BOCs, US West, does not rely solely on SCIS, but has developed its own model, Switching Cost Model (SCM). In the *SCIS In Camera Order*, the term "SCIS" was used to refer to SCIS, SCM, and any other similar computer model, and we use "SCIS" in the same way here. *See* Commission Requirements for Cost Support Materials To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 521, 521 n.4 (Com.Car.Bur. 1991) (*SCIS In Camera Order*).

[4] Commission Requirements for Cost Support Materials To Be Filed with Open Network Architecture Access Tariffs, 6 FCC Rcd 5682 (Com.Car.Bur. 1991) (*ONA TRP Order*).

[5] *Id.* at 5682 n.9.

[6] Freedom of Information Act, 5 U.S.C. § 552(b)(4). Exemption 4 provides that "trade secret and commercial or financial information obtained from a person and privileged or confidential" is not subject to mandatory disclosure.

[7] *SCIS In Camera Order*, 7 FCC Rcd at 521, para. 2. In the subsequent *ONA Investigation Order*, the Bureau initiated an investigation into the BOCs' ONA tariffs, and later designated several SCIS-related issues in that investigation. Bell Atlantic Telephone Companies, *et al.*, Open Network Architecture Tariffs, 7 FCC Rcd 1512 (Com.Car.Bur. 1992) (*ONA Investigation Order*); Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, 7 FCC Rcd 2604 (Com.Car.Bur. 1992) (*ONA Designation Order*). In the *SCIS Disclosure Order*, released simultaneously with the *ONA Investigation Order*, the Bureau ordered the BOCs to redact proprietary data from SCIS and make that redacted version of the model available to parties in the investigation, subject to nondisclosure agreements. Commission Requirements for Cost Support Materials To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com.Car.Bur. 1992) (*SCIS Disclosure Order*).

[8] Allnet Application at 2-3.

[9] *Id.* at 3.

4. Allnet maintains that the information contained in SCIS does not fall within FOIA Exemption 4. Specifically, Allnet alleges SCIS disclosure does not meet the standard for Exemption 4 established in the *National Parks* case: it would neither impair the Government's ability to obtain necessary information in the future, nor cause substantial competitive harm to the person from which the information was obtained.[10] Allnet argues that Bellcore has no intellectual property rights in SCIS because the model has not been patented or copyrighted. Even if it were, argues Allnet, patent and copyright law would be adequate to protect Bellcore's intellectual property rights.[11] Finally, Allnet believes confidential treatment of this information undermines parties' participation in the pending ONA investigation and the Commission's goal of cost-based ONA rates.[12] Allnet asserts that some portion of SCIS could be made available for public inspection if proprietary information supplied by switch vendors were redacted.[13]

5. The Commission has considered these issues before. In the *Allnet FOIA Reconsideration Order*, we found that, if only vendor pricing data were redacted from SCIS, proprietary data could still be derived from the remaining model.[14] The Commission also stated in that Order that it had no reason to dispute switch manufacturers' assertions that the pricing and cost information in question is, in fact, held in confidence by them and that disclosure of this information would result in substantial harm to vendors.[15] We also found that there was no support for claims that patented or copyrighted materials might not enjoy the protection afforded by FOIA Exemption 4.[16] Allnet sought judicial review of this Order, and the United States District Court granted the Commission's motion for summary judgment against Allnet.[17] Thus, since Allnet raises no new issues in the application before us now, we dismiss it as moot.[18]

6. Accordingly, IT IS ORDERED that the application for review filed by Allnet Communications, Inc. IS DISMISSED, to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[10] Allnet Application at 5-7, *citing* National Parks and Conservation Assn v. Morton, 498 F.2d 765, 768 (D.C.Cir. 1974) (*National Parks*).

[11] *Id.* at 4.

[12] *Id.* at 1. *See* Bell Atlantic Telephone Companies, *et al.*, Open Network Architecture Tariffs, 7 FCC Rcd 1512 (Com.Car.Bur. 1992) (*ONA Investigation Order*).

[13] *Id.* at 2.

[14] Allnet Communication Services, FOIA Control No. 92-266, Memorandum Opinion and Order, 7 FCC Rcd 6329 (1992) (*Allnet FOIA Reconsideration Order*), at 6330 para. 13.

[15] *Id.*

[16] *Id.* at 6329 para. 7.

[17] Allnet Communications Services, Inc. v. FCC, No. 92-1350 (CRR) (D.D.C., Aug. 31, 1992), *appeal docketed*, Allnet Communications Services, Inc. v. FCC, No. 92-5351 (D.C. Cir. September 25, 1992).

[18] In the *SCIS Disclosure Order*, the Bureau required the BOCs, among other things, to develop a redacted SCIS model to enable Allnet and other intervenors to participate as fully as possible in the ONA tariff investigation without compromising proprietary vendor data. Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com.Car.Bur. 1992) (*SCIS Disclosure Order*). The Bureau also invited intervenors to comment on this process in their pleadings in the ONA investigation. Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 5307 (Com.Car.Bur. 1992) (*ONA Investigation Rescheduling Order*). On December 11 and 14, 1992, the Bureau by letter requested Arthur Andersen to answer questions regarding SCIS and SCM, and requested the BOCs to submit additional information to the Bureau and Arthur Andersen regarding their use of SCIS and SCM in ONA ratemaking. Some or all of this information will be provided to intervenors, although no alteration in the scope of discretionary disclosure or mandatory public disclosure is contemplated as a consequence of updating BOC data and expanding some aspects of the auditor's analysis. In light of the supplemental record being developed in the ONA tariff investigation, which may mitigate some intervenors' concerns with the disclosure process when complete, we conclude that Allnet's argument regarding its participation in the ONA investigation is better addressed in the context of the ONA investigation.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Telephone Operating Companies

Revisions to Tariff F.C.C. No. 1 Transmittal No. 752

ORDER

Adopted: January 7, 1993; Released: January 8, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 10, 1992, the GTE Telephone Operating Companies (GTOC) filed Transmittal No. 752 to establish an optional service to block international direct-dialed sequences (011+ and 10XXX+011+) and introduce a nonrecurring charge of $19.95 to establish this option. Transmittal No. 752 is scheduled to take effect January 9, 1993.

2. The American Public Communications Council (APCC) filed comments regarding Transmittal No. 752 on November 25, 1992. APCC requests that the Commission suspend Transmittal No. 752 for one day, impose an accounting order and then let the transmittal take effect subject to an investigation. APCC contends that the rate for international call blocking proposed by this transmittal is not adequately supported and appears unreasonably high. APCC Comments at 2. APCC argues that the cost for the service should be lower because GTOC has underestimated demand by failing to consider use of this service by non-aggregator business users. *Id.* at 4.

3. GTOC filed a reply on December 7, 1992. It states that the proposed rate for international call blocking is averaged for all GTE jurisdictions and is supported by average costs. GTOC Reply at 2.

4. The Common Carrier Bureau has reviewed GTOC Transmittal No. 752 and all associated submissions. We conclude that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the request to suspend and investigate the GTE Telephone Operating Companies' Transmittal No. 752, filed by the American Public Communications Council, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Telephone Companies

Revisions to Tariff F.C.C. No. 5 — Transmittal Nos. 310 and 312

ORDER

Adopted: January 7, 1993; Released: January 8, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 25, 1992, the United Telephone Companies (United) filed Transmittal No. 310 to establish an optional service to block international direct-dialed sequences (011+ and 10XXX+011+) and introduce both monthly and nonrecurring charges to establish this option. On January 8, 1993, United filed Transmittal No. 312 to eliminate the monthly charge for international call blocking. Both transmittals are scheduled to take effect January 10, 1993.

2. The American Public Communications Council (APCC) filed comments regarding Transmittal No. 310 on December 10, 1992. APCC requests that the Commission suspend Transmittal No. 310 for one day, impose an accounting order and then let the transmittal go into effect, subject to an investigation. APCC Comments at 1. APCC contends that the rates for international call blocking proposed by this transmittal, a non-recurring charge of between $3.40 and $7.30 per line, a monthly charge of between $2.20 and $3.90 per line and a "switched access service order charge" of between $25.50 and $80.00 per premises, are at the extreme high end of the charges proposed by any of the local exchange carriers (LECs). *Id.* at 3. APCC argues that United's recurring charges are excessive and that other LECs have recognized that there is no investment or ongoing expenses associated with providing this service. APCC also challenges specific aspects of United's cost support for its monthly charge. *Id.* at 4-6. APCC does not challenge United's non-recurring charge except to say that it is excessive when combined with United's other charges. *Id.* at 7. Finally, APCC objects to United's $25-$80 "switched access order charge" as not supported by the cost justification. *Id.* at 7.

3. United's reply, filed on December 21, 1992, states that the "comments" filed by APCC are not procedurally correct under the Commission's rules, that APCC should have filed a "petition." United further argues that its service order charge has previously been reviewed and approved by the Commission. United Reply at 1. United claims that it has a typical investment, per location, of $12,500 and incurs both recurring and non-recurring engineering expenses to provide international blocking. *Id.* at 3-4.

4. The Common Carrier Bureau has reviewed United Transmittal Nos. 310 and 312 and all associated submissions. We conclude that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the request to suspend and investigate the United Telephone Companies' Transmittal No. 310, filed by the American Public Communications Council, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications, Inc.

Revisions to Tariff F.C.C. No. 1 Transmittal No. 74

ORDER

Adopted: January 7, 1993; Released: January 8, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 25, 1992, BellSouth Telecommunications, Inc. filed Transmittal No. 74 to establish an optional service to block international direct-dialed sequences (011+ and 10XXX+011+) and introduce both monthly and nonrecurring charges to establish this option. On January 8, 1993, BellSouth filed Transmittal No. 85 to eliminate the monthly charge for international call blocking. Both transmittals are scheduled to take effect on January 9, 1993.

2. The American Public Communications Council (APCC) filed a petition on December 10, 1992, requesting that Transmittal No. 74 be rejected or, in the alternative, suspended and investigated. APCC contends that the rates proposed by this transmittal, a non-recurring charge of $19.00 and a monthly charge of $5.47, are far higher than proposed by other larger local exchange companies (LECs) and are so high that they may discourage use of the service and frustrate the Commission's attempts to end toll fraud. APCC Petition at 3-4. APCC further argues that the cost support provided by BellSouth is inadequate under Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, to justify the proposed rates. *Id.* at 5. In support of its arguments, APCC states that the "vast majority" of the other LECs filing similar tariffs proposed only non-recurring charges. *Id.* at 5-6. Finally, APCC argues that BellSouth's proposed monthly rate is far higher than all but one other LEC, and that it is higher than BellSouth itself charges for state-tariffed services which bundle international call blocking and originating line screening. *Id.* at 7.

3. BellSouth filed a reply on December 21, 1993. BellSouth argues that, under the Communications Act and Commission precedent, rejection of a tariff is an extreme remedy. BellSouth Reply at 2. BellSouth claims that this proposed service is subject to the price cap rules and that it provided cost support which satisfies the Commission's requirements for "new services." *Id.* at 3. In response to APCC's criticism of its cost justification, BellSouth defends its allocation of investment to this service and the overhead loading factor it applies to this proposed service. *Id.* at 4.

4. The Common Carrier Bureau has reviewed BellSouth Transmittal Nos. 74 and 85, and all associated submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate BellSouth Telecommunications, Inc.'s Transmittal No. 74, filed by the American Public Communications Council, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1 — Transmittal Nos. 540, 545

ORDER

Adopted: January 8, 1993; Released: January 8, 1993

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. On December 21, 1992, the Bell Atlantic Telephone Companies (Bell Atlantic) filed an interim tariff for expanded interconnection with local telephone company facilities pursuant to the Commission's *Expanded Interconnection Order*[1] in CC Docket No. 91-141. The *Expanded Interconnection Order* required those LECs with existing intrastate expanded interconnection arrangements to file federal tariffs allowing interstate special access traffic to be carried over existing state arrangements pursuant to state rates except for the contribution charge.[2] Bell Atlantic's interim tariff is scheduled to become effective January 11, 1993, on 21 days' notice.

2. On December 28, 1992, MFS Communications Company, Inc. (MFS) filed a petition to suspend and investigate Bell Atlantic's interim tariff. Bell Atlantic filed its reply on January 4, 1993.

II. TARIFF AND PLEADINGS

3. Bell Atlantic Transmittal No. 540 introduces Bell Atlantic's interstate interim High Capacity Interconnection Service (HCIS). HCIS offers both physical and virtual collocation to fiber optic interconnectors for interconnection with Bell of Pennsylvania's DS1 and DS3 services at certain designated central offices in the Philadelphia and Pittsburgh LATAs.[3] An interconnector taking service under Bell Atlantic's interstate interim HCIS must subscribe to at least one physical and one virtual collocation arrangement.[4] Bell Atlantic's interstate HCIS is a trial offering, as is the intrastate HCIS tariff on which it is based. Bell Atlantic's intrastate interconnection tariff is currently scheduled to expire on November 30, 1993. If Bell Atlantic's permanent interstate interconnection tariff is not effective by November 30, 1993, Bell Atlantic's interim interstate HCIS tariff will expire on that date, unless Bell Atlantic's intrastate HCIS tariff is extended.[5] Bell Atlantic Transmittal No. 545 provides additional cost support for the cross-connect element, a revised overhead loading factor to apply to the costs, and the new, lower rates that result from the revised overhead loadings.

4. MFS asserts that Bell Atlantic's proposed recurring and nonrecurring rates for the cross-connect element for interstate services are grossly inflated.[6] MFS notes that with the exception of Bell Atlantic, the LECs' cross-connect charges are consistent, *i.e.*, approximately $4 per DS1 and $40 per DS3. In contrast, MFS points out that Bell Atlantic proposes recurring cross-connect rates of $46.07 per DS1 and $146.47 per DS3, which MFS characterizes as "usurious and anticompetitive."[7] MFS alleges that the "work papers" filed by Bell Atlantic do not provide credible support for Bell Atlantic's proposed cross-connect rates because they provide grossly aggregated sums for purported direct and overhead costs, with no detail and no explanation of the methods used to compute the amounts, and such data cannot be used for any reasonable analytical purpose.[8] MFS requests that these rates be suspended pending investigation.[9]

5. Bell Atlantic replies that since different companies provision similar services differently, their reasonable rates can and do therefore differ. Bell Atlantic asserts that MFS ignores the statements in Bell Atlantic's D&J that its cross-connect rate element covers additional components besides the bare cross-connect. Bell Atlantic states that for physical collocation, its cross-connect rate includes the costs to obtain, install, and maintain a repeater, cable, and a cable rack; and for virtual collocation, its rate includes cable and maintenance of collocator-designated equipment. Bell Atlantic asserts that its rate is necessarily higher than those of other carriers because it covers more extensive services, as does the intrastate tariff it mirrors.[10]

6. Bell Atlantic also denies it has done anything improper by including overhead loadings in its cross-connect rate element. Bell Atlantic asserts that the *Expanded Interconnection Order* requires LECs to exclude only contribution charges included in the intrastate tariff, and that Bell Atlantic has done so.[11] Bell Atlantic further states that the *Expanded Interconnection Order* intends that the LECs include overhead costs, and specifically endorses the application of uniform overhead loadings to connection charges,

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[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, and Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket No. 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*).

[2] *Id.* at ¶ 262.

[3] Bell Atlantic Tariff F.C.C. No. 1, Sections 19.2, 19.4.3; Bell Atlantic Description and Justification (D&J) at 1.

[4] Bell Atlantic Tariff F.C.C. No. 1, Section 19.4.G; Bell Atlantic D&J at 1.

[5] Bell Atlantic Tariff F.C.C. No. 1, Section 19.4; Bell Atlantic D&J at 2.

[6] MFS Petition at 1-2.

[7] *Id.* at 2-3.

[8] *Id.* at 3-4.

[9] *Id.* at 5.

[10] Bell Atlantic Reply at 2.

[11] *Id.* at 2. Bell Atlantic states that its interstate cross-connect rates are lower than the corresponding Pennsylvania rates, which were set at "contribution-neutral" levels. To illustrate, Bell Atlantic notes that its interstate rates for physical collocation are $46.07 for DS1 and $146.47 for DS3, whereas the intrastate rates from which they were derived are $101.15 and $1,213.18, respectively. *Id.* n.5. Bell Atlantic subsequently revised its interstate rates to $32.44 and $119.16, respectively. Bell Atlantic Transmittal No. 545.

which Bell Atlantic claims it has done.[12] In addition, Bell Atlantic argues that the validity of its rates is not undercut by the fact that some carriers have, under protest, filed interim rates that fail to cover their costs.[13]

7. MFS also charges that Bell Atlantic's proposed nonrecurring charges (NRCs) for its collocation service are excessive. MFS states that Bell Atlantic provides no cost support for its proposed NRCs of $660 per DS1 cross-connect and $1,800 per DS3 cross-connect for both virtual and physical collocation arrangements. MFS further notes that of the other LECs that have filed interim collocation tariffs, only New England Telephone has imposed a NRC, and then only a rate of $100 per DS1 cross-connect. MFS thus requests suspension of Bell Atlantic's proposed cross-connect NRCs pending investigation.[14]

8. In addition, MFS alleges that Bell Atlantic's proposed nonrecurring application fees of $3,000 or $4,250 are unreasonable. MFS asserts that Bell Atlantic neither provides cost support for these charges nor explains what costs they are intended to recover. MFS also argues that the Commission expressly prohibited the imposition of NRCs as a threshold for achieving collocation, citing in support the Commission's refusal to permit the LECs to assess a NRC on interconnectors submitting a bona fide request to cover the costs of surveying the central office for space availability. MFS alleges that the application fees proposed by Bell Atlantic appear to impose precisely such prohibited charges, thereby compelling suspension of its tariff filing.[15] Bell Atlantic replies that these NRCs exactly mirror the charges in its Pennsylvania tariff and so comply with the *Expanded Interconnection Order*.[16]

9. Finally, MFS argues that Bell Atlantic's filing contains a provision that appears to impose excessive channel mileage charges on interconnectors and thus requires modification or clarification. MFS alleges that the provision that "DS3 Channel Mileage is provided on an individual DS3 channel basis" appears to prevent interconnectors that purchase multiple DS3 circuits from Bell Atlantic from obtaining the volume discounted channel mileage rates available under Bell Atlantic's High Capacity Service and DS3 Rate Stability Payment Plan offerings. MFS asserts that applying such a prohibition to interconnectors would be unreasonably discriminatory and thus would compel rejection of the filing. MFS thus requests that the Commission require Bell Atlantic to clarify that this provision does not prevent interconnectors from purchasing its volume-discounted channel mileage rates.[17]

10. Bell Atlantic responds that this provision mirrors the Pennsylvania tariff and clarifies that intrastate volume discounts on DS3 channel mileage are not available for use with the interstate interim interconnection tariff. Bell Atlantic asserts that this provision does not deny MFS access to any existing interstate volume discount because, contrary to MFS's claims, the interstate DS3 tariff does not currently offer a volume discount on channel mileage.[18] Bell Atlantic also asserts that term pricing cannot be made available in the interim tariff because this tariff, like the Pennsylvania tariff it mirrors, is a temporary, one-year trial offering, and so can connect only to a month-to-month DS3 service.[19]

11. MFS concludes that it does not want Bell Atlantic's unreasonable rates to defer the implementation of collocation in Bell Atlantic's service areas. MFS thus requests that the Commission suspend Bell Atlantic's filing for one day, initiate a full investigation of these rates, and subject these rates to an accounting order.[20] Bell Atlantic responds that there is no justification for the Commission to suspend or investigate its tariff.[21]

III. DISCUSSION AND ORDERING CLAUSE

12. The Common Carrier Bureau has reviewed Bell Atlantic Transmittal Nos. 540 and 545, the petition filed by MFS, and related pleadings. We conclude that this tariff does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

13. Accordingly, IT IS ORDERED that the petition filed by MFS Communications Company, Inc. to suspend and investigate Bell Atlantic's interim tariff IS DENIED.[22]

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

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[12] *Id.* at 3.
[13] *Id.* at 3-4.
[14] MFS Petition at 5 & n.5.
[15] *Id.* at 5-6.
[16] Bell Atlantic Reply at 4.
[17] MFS Petition at 6-7.
[18] Bell Atlantic Reply at 4. Bell Atlantic states that although the tariff has rates for one DS3 and for three DS3s, the latter rate is simply three times the former. *Id.* n.4.
[19] *Id.* at 5.
[20] MFS Petition at 7.
[21] Bell Atlantic Reply at 1, 4.
[22] We note that given the substantial differences between the requirements for the interim and permanent expanded interconnection tariffs, our decision not to suspend or reject Bell Atlantic's interim tariff should not be construed as precedent for our review of its permanent tariff.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell
Telephone Company

Revisions to Tariff F.C.C. No. 73 — Transmittal Nos. 2242 and 2249

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

ORDER

Adopted: January 7, 1993; Released: January 8, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 25, 1992, Southwestern Bell Telephone Company (Southwestern) filed Transmittal No. 2242 to establish an optional service to block international direct-dialed sequences (011+ and 10XXX+011+) and introduce a nonrecurring charge of $15.00 and a recurring charge of $1.50 per month to establish this option. On January 7, 1993, Southwestern filed Transmittal No. 2249 to eliminate the monthly charge for international call blocking and raise the non-recurring charge to $20.00. Both transmittals are scheduled to take effect January 10, 1993.

2. The American Public Communications Council (APCC) filed comments regarding Transmittal No. 2242 on December 10, 1992. APCC requests that the Commission suspend Transmittal No. 2242 for one day, impose an accounting order and then let the transmittal take effect subject to an investigation. APCC contends that the federally tariffed service fails to include some payphone owners because mandatory blocking of international calls is already required by order of the Texas Public Utility Commission. APCC Comments at 2. APCC further contends that Southwestern's monthly and non-recurring charges are unjustified. *Id.* at 3-4. APCC also challenges Southwestern's assumptions about investment and demand. *Id.* at 7.

3. Southwestern filed a reply on December 21, 1992. It states that, since its Texas tariff already provides for mandatory international blocking for some aggregators, an optional federal service providing the same capabilities is "illogical." Southwestern Reply at 2. Southwestern also argues that its recurring rates are justified because there is a recurring benefit to customers as well as a monthly incremental unit cost to provide the blocking. Southwestern claims that it has provided the cost justification required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. *Id.* at 6.

4. The Common Carrier Bureau has reviewed Southwestern Transmittal Nos. 2242 and 2249 and all associated submissions. We conclude that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the request to suspend and investigate the Southwestern Bell Telephone Company Transmittal No. 2242, filed by the American Public Communications Council, IS DENIED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE System Telephone Companies

Revisions to Tariff F.C.C. No. 1 Transmittal No. 27

ORDER

Adopted: January 7, 1993; Released: January 8, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 10, 1992, GTE System Telephone Companies (GSTC) filed Transmittal No. 27 to establish an optional service to block international direct-dialed sequences (011+ and 10XXX+011+) and introduce a nonrecurring charge of $19.95 to establish this option. Transmittal No. 27 is scheduled to take effect January 9, 1993.

2. The American Public Communications Council (APCC) filed comments regarding Transmittal No. 27 on November 25, 1992. APCC requests that the Commission suspend Transmittal No. 27 for one day, impose an accounting order and then let it take effect subject to an investigation. APCC contends that the rate for international call blocking proposed by this transmittal is not adequately supported and appears unreasonably high, in violation of Section 201 of the Communications Act, 47 U.S.C. § 201. APCC Comments at 2. APCC argues that the cost for the federally tariffed service should be lower because GSTC has underestimated demand by failing to consider use of this service by non-aggregator business users. *Id.* at 4.

3. GSTC filed a reply on December 7, 1992. It states that the proposed rate for international call blocking is averaged for all GTE jurisdictions and is supported by average costs. GSTC Reply at 2.

4. The Common Carrier Bureau has reviewed GSTC Transmittal No. 27 and all associated submissions. We conclude that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the request to suspend and investigate the GTE System Telephone Companies' Transmittal No. 27 filed by the American Public Communications Council IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GASTON MEMORIAL HOSPITAL File No. ENF 92-07

Petition for Waiver of Section
64.704(c) of the Commission's Rules

ORDER

Adopted: January 7, 1993; Released: January 8, 1993

By the Chief, Common Carrier Bureau:

1. The Gaston Memorial Hospital of Gastonia, North Carolina ("Gaston") has filed a request for a waiver of Section 64.704(c) of the Commission's rules, 47 C.F.R. § 64.704(c), requiring call aggregators to unblock equal access ("10XXX") codes.[1]

2. In support of its waiver request, Gaston contends that its 10 customer-owned coin-operated telephones are technically incapable of providing 10XXX dialing capabilities. Gaston adds that the payphone manufacturer is no longer in business, and that the expense of modifying the telephones is significant. Gaston does not, however, provide verified information regarding the cost of modification or replacement. Gaston proposes an alternative to unblocking the payphones to provide 10XXX dialing under which it would employ the speed dialing feature in each of its telephones in combination with the posting of a list of all operator services providers certified by the state. Gaston claims that this proposal would permit customers to use the operator services providers of their choice.

3. On June 23, 1992, the Commission released a Public Notice which established a comment period for the waiver request. *Public Notice*, 7 FCC Rcd 3963 (1992). No comments were filed specifically addressing Gaston's petition.

4. The Common Carrier Bureau has reviewed Gaston's waiver request and concludes that Gaston has failed to establish good cause for the waiver as required under Section 1.3 of the Commission's Rules, 47 C.F.R § 1.3. *See Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). First, Gaston does not assert that 10XXX unblocking is impossible. It merely states that the current equipment can not be converted and that conversion to equipment capable of unblocking will cost $750.00 per telephone. Thus, Gaston's petition essentially seeks a waiver based on excessive cost, but fails to prove with particularity that the costs are, in fact, excessive. Also, the Commission, after Gaston filed its request, ordered OSPs to compensate payphone owners for their role in originating interstate calls. *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, CC Docket No. 91-35, Second Report and Order, 7 FCC Rcd 3251 (1992). Further, the bare assertion that Gaston's speed dialing alternative will provide public access to all operator services providers is unpersuasive. The Commission, in the *Report and Order* and *Reconsideration Order*, established the 10XXX unblocking requirement after lengthy consideration of the substantial public interest in obtaining full and equal access to all operator services providers. The express goals and policies underlying the Commission's unblocking requirements would be frustrated if the Commission allows substitutions to unblocking the recognized and widely-used dialing sequences.

5. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the petition filed by Gaston Memorial Hospital for waiver of Section 64.704(c) of the Commission's Rules IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] In its *Report and Order* in CC Docket No. 91-35, the Commission adopted rules requiring payphone owners to unblock 10XXX dialing within six months of the effective date of the regulations, *i.e.*, on or before March 16, 1992. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991) (hereinafter *Report and Order*); Order on Reconsideration, 7 FCC Rcd 4355 (1992) (hereinafter *Reconsideration Order*). Subsequently, the Commission stayed that requirement pending its resolution of petitions for reconsideration of the unblocking requirement. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Order, 7 FCC Rcd. 2146 (1992). The *Reconsideration Order* reaffirmed the requirement that payphone owners unblock 10XXX access. The Commission required payphone owners to unblock their phones no later than January 10, 1993, depending on the availability of local exchange carriers' (LECs) blocking and screening services.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-237

In the Matter of

Administration of the North
American Numbering Plan

ORDER

Adopted: January 7, 1993; Released: January 8, 1993

By the Deputy Chief, Common Carrier Bureau:

1. On December 28, 1992, comments were received relating to the Administration of the North American Numbering Plan (NANP).[1] Bell Canada has expressed concern that interested parties with no physical presence in Washington D.C. will find it difficult to obtain copies of initial comments and to develop meaningful reply comments in the relatively short reply comment period. Bell Canada has requested that the deadline for reply comments be extended from January 27, 1993 to February 24, 1993.

2. It is the policy of the Commission that extensions of time shall not be routinely granted.[2] However, the issues presented in this proceeding are important, numerous, complex, and involve a number of parties such as Bell Canada that do not normally participate in proceedings before the Commission. Therefore, we believe that additional time should be provided for filing reply comments in Phase 1 of the inquiry (which concerns issues related to the overall administration of the NANP). Accordingly, we extend the date for reply comments in Phase 1, as requested, until February 24, 1993.

3. Unlike Phase 1 of the Inquiry, Phase 2 deals with a much more narrowly focused issue (the planned expansion of Carrier Identification Codes from three to four digits). Numerous parties urge us to address this issue immediately. Because we do not wish to create any unnecessary delays, we will not extend the reply comment date in Phase 2. Reply comments on Phase 2 will be due as previously scheduled on January 27, 1993.

4. Accordingly, IT IS ORDERED, pursuant to sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91 and 0.291, that the request for an extension of time is GRANTED in part. The deadline for filing reply comments in Phase 1 is extended to February 24, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

[1] This proceeding was initiated by a Notice of Inquiry released October 29, 1992.
[2] *See* 47 C.F.R. §1.46(a)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions for Waiver of Section 64.704(c) of the Commission's Rules — File No. ENF 92-06

ORDER

Adopted: January 7, 1993; Released: January 8, 1993

By the Chief, Common Carrier:

1. Twenty-four petitioners[1] have requested waivers of Section 64.704(c) of the Commission's rules requiring call aggregators to unblock equal access ("10XXX") codes,[2] alleging that compliance with that rule will impose on them excessive costs.[3]

2. The petitioners, in substantially similar pleadings, assert that unblocking would impose unreasonable financial costs and, in some cases, force them out of business. In these waiver petitions, the costs alleged to bring payphone equipment into compliance range from $200 per payphone, where only modifications are required, to $1000 - $1300 where complete replacement is necessary.[4] The petitioners generally assert that the total cost of unblocking all of their payphones is prohibitive.[5]

3. On June 23, 1992, the Commission released a Public Notice which established a comment period for these waiver requests. *Public Notice*, 7 FCC Rcd 3964 (1992). The American Public Communications Council (APCC) filed comments in support of the waivers, and Sprint Communications Company L.P. (Sprint) and American Telephone and Telegraph Company (AT&T) filed comments opposing the waiver requests. The APCC stated that its members "are generally small businesses" and that, in their particular circumstances, "the equipment modifications necessary to allow 10XXX access would impose very burdensome costs, ranging from $1000, and that the cost of compliance would threaten the survival of their businesses." APCC states further that "the imposition of such economic hardships on the Petitioners would be inequitable and would not advance the policy underlying the rule, particularly since the Commission has determined that non-payphone owners incurring costs of only $15.01 per line may defer compliance with the 10XXX dialing requirement until 1997." Both AT&T and Sprint assert that the petitioners have failed to prove the special circumstances necessary to justify the granting of a waiver based on excessive costs. AT&T argues that petitioners should be required to document unique technical factors affecting their ability to unblock, specific facts underlying their cost estimates, and the sources of their information. Similarly, Sprint notes that costs must be placed in the context of the useful life of the payphone equipment.

4. The Common Carrier Bureau has reviewed these requests and concludes that the petitioners have failed to show good cause for granting the waivers as required by Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. In these cases, the petitioners have failed to provide any documentary evidence to support their cost allegations or to show that the costs are unreasonable, measured against other factors, such as age of the payphones and gross revenues.

5. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). The Commission has found, however, that the public interest is served by consumers having use of an efficient dialing method and that they be able to choose freely among the available operator service providers (OSPs).[6] Moreover, the bare allegation that costs are excessive, without reference to, as well as detailed proof of, other pertinent factors such as the extent to which the pay telephones have been depreciated and revenues, substantiated by probative documentation, such as audited financial statements, is clearly insufficient. Equally unpersuasive is the waiver request which simply asserts that unblocking costs will make it impossible for the payphone owner to continue service to the public, unsub-

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[1] Petitioners are: 4M Communications Inc.; Acme Markets, Inc.; Chronometric Telecommunications, Inc.; Coincall Plus, Inc.; Coin Op Phone Service; Continental Payphone Corporation; Easy Living Telecommunicatons Inc.; Florida First Phones, Inc.; Intex International, Inc.; Lincoln Telephone and Telegraph Company; MTI; National Telecoin Corporation; Need a Phone Company; Pacific Communications, Inc.; Payphone Management Systems; Pennsylvania Pay Telephone; Pier 7 Restaurant; S.E. Netcom Company; Telaleasing Enterprises, Inc.; Tele-A-Booth Communications, Ltd.; Teltrust Phones, Inc.; Tri-County, Inc.; Vail Communications, Inc.; Zenith Information Systems, Inc.; and M&M Telecommunications, Inc.

[2] In its *Report and Order* in CC Docket No. 91-35, the Commission adopted rules requiring payphone owners to unblock 10XXX dialing within six months of the effective date of the regulations, *i.e.*, on or before March 16, 1992. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991) (hereinafter *Report and Order)*; Order on Reconsideration, 7 FCC Rcd 4355 (1992) (hereinafter *Reconsideration Order)*. Subsequently, the Commission stayed that requirement pending its resolution of petitions for reconsideration of the unblocking requirement. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Order, 7 FCC Rcd 2146 (1992). The *Reconsideration Order* reaffirmed the requirement that payphone owners unblock 10XXX access. The Commission required payphone owners to unblock the dialing sequence no later than January 10, 1993, depending on the availability of local exchange carriers' (LECs') blocking and screening services.

[3] Certain other petitioners filed petitions for waiver, asserting that compliance will expose them to fraudulent calling. These petitions are being addressed in a separate order.

[4] The Lincoln Telephone and Telegraph Company, a local exchange carrier, alleges a cost of $31,250 per payphone to unblock 10XXX access. *See* Petition for Waiver Transmittal Letter at page 1. Lincoln's request is based on the need to replace central office equipment to recognize the 10XXX dialing sequence.

[5] Individual estimates vary between $13,500 and $367,500.

[6] *Report and Order*, 6 FCC Rcd at 4745.

stantiated by probative documentary evidence showing *inter alia* revenue impacts, financial condition, market statistics, or any other relevant information.

6. In the *Reconsideration Order*, the Commission noted that pay telephone owners are in the business of providing telephone service and thus have an incentive to remain competitive by upgrading their equipment.[7] Moreover, the Commission has implemented a plan for OSPs to reimburse pay telephone owners for their role in originating interstate telephone calls from their facilities.[8] Petitioners do not mention this source of revenue in their requests, nor do they explain how they equitably could expect to receive such compensation if they block interstate calls that originate with a widely-used dialing sequence.

7. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the petitions for waiver of Section 64.704(c) of the Commission's Rules filed by petitioners identified in footnote 1 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[7] *Reconsideration Order*, 7 FCC Rcd at 4363, para. 30.
[8] *Report and Order*, 6 FCC Rcd at 4745. *See Second Report and Order*, CC Docket 91-35, 7 FCC Rcd 3251 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions for Waiver of Section 64.704(c) of the Commission's Rules — File No. ENF-92-06

ORDER

Adopted: January 7, 1993; Released: January 8, 1993

By the Chief, Common Carrier Bureau:

1. Eleven petitioners[1] have requested waivers of Section 64.704(c) of the Commission's rules, 47 C.F.R. § 64.704(c), requiring call aggregators to unblock equal access ("10XXX") codes,[2] on the grounds that unblocking would render their payphones vulnerable to fraud.[3]

2. The petitioners, in virtually identical pleadings, maintain that their pay telephones cannot be modified to allow 10XXX access without increasing their vulnerability to payphone fraud. Specifically, petitioners assert that 10XXX unblocking would expose them to a high risk of fraud because the LECs do not provide blocking service for direct dial international calls or screening services which inform operator services providers of restrictions that apply on lines to which callers seek to bill their calls.

3. On June 23, 1992, the Commission released a Public Notice which established a comment period for these waiver requests. *Public Notice*, 7 FCC Rcd 3964 (1992). Sprint Communications Company L.P. and American Telephone and Telegraph Company filed comments opposing the waiver requests, and the American Public Communications Council filed comments in support of the waivers.

4. The Common Carrier Bureau has reviewed these waiver requests and concludes that subsequent to the filing of the waiver petitions, appropriate protections have been established so that petitoners' concerns have been satisfied. In the *Reconsideration Order*,[4] the Commission reaffirmed the requirement that payphone owners unblock 10XXX access, but directed LECs to make blocking and screening services available no later than January 10, 1993, and excused compliance by payphone owners not covered through blocking and screening services until 30 days after LECs make these services available for aggregator telephones (but no later than January 10, 1993). The waiver requests were filed during the interval between the release of the *Report and Order* on August 9, 1991, and the *Reconsideration Order* on July 10, 1992. The Commission's action in the *Reconsideration Order* effectively satisfies all of the petitioners' arguments.

5. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Section 0.291 of the Commission rules, 47 C.F.R. § 0.291, that the petitions for waiver of Section 64.704(c) of the Commission's Rules identified in footnote 1, based on allegations of vulnerability to payphone fraud, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] Petitioners are: AZCA Communications, Inc.; American PAYTEL; Coin Telephonics of New York; Communications Vending Corp. of Arizona; Dennison Group Ltd.; IMR Capital Corporation; Indiana Telcom Corporation; National Brands, Inc.; National Public Phone Company; Pay Tel Communications, Inc; and Teleplex Coin Communications, Inc.

[2] In its *Report and Order* in CC Docket No. 91-35, the Commission adopted rules requiring payphone owners to unblock 10XXX dialing within six months of the effective date of the regulations, *i.e.*, on or before March 16, 1992. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991) (hereinafter *Report and Order)*; Order on Reconsideration, 7 FCC Rcd 4355 (1992) (hereinafter *Reconsideration Order)*. Subsequently, the Commission stayed that requirement pending its resolution of petitions for reconsideration of the unblocking requirement. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Order, 7 FCC Rcd 2146 (1992). The *Reconsideration Order* reaffirmed the requirement that payphone owners unblock 10XXX access. The Commission required payphone owners to unblock their phones no later than January 10, 1993, depending on the availability of local exchange carriers' (LECs) blocking and screening services.

[3] Other petitions, based on the cost of unblocking the 10XXX dialing sequence, are being treated in a separate order.

[4] *Reconsideration Order*, 7 FCC Rcd at 4360-4362.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 11, 1993

Released: January 19, 1993

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

H. Drew Wilder, Vice President — 8310-SP
Radio WBAW, Inc., Licensee — 92070631
Radio Station WBAW(AM) — 92080422
P.O. Box 447 — 92090678
Barnwell, SC 29812

Dear Mr. Wilder:

This letter constitutes a Notice of Apparent Liability for a Forfeiture against Radio WBAW, Inc., licensee of Radio Station WBAW(AM), Barnwell, SC, for the willful violation of Section 73.1206 of the Commission's Rules. Our action is based on the facts set forth below.

The Commission received a complaint alleging that on April 2, 1992, someone representing Station WBAW placed a telephone call to the complainant's employee, Mr. Andy Sanders, recorded the telephone conversation, and broadcast the conversation several times without having informed Mr. Sanders prior to recording the conversation of its intended broadcast use. Based on this complaint the Commission sent you a letter of inquiry on August 12, 1992. You responded by letter dated August 17, 1992, confirming that the telephone call was placed on April 2, 1992, recorded and subsequently broadcast on the same day during several newscasts. Although in your response you state, "it is our strong belief that Mr. Sanders was aware that his comments were to be used for a broadcast news story," you provide no evidence that he was indeed informed that his remarks were being recorded for subsequent broadcast use. You have not provided a tape, affidavits, or any other evidence, and the complainant insists that Mr. Sanders was not aware that he was being recorded for broadcast use by Station WBAW(AM).

It appears from the information available to the Commission that Radio Station WBAW(AM), Barnwell, SC, in apparent willful violation of Section 73.1206 of the Commission's Rules, recorded and subsequently broadcast the conversation with Andy Sanders without first informing him that it was being recorded for broadcast. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Radio WBAW, Inc., licensee of Station WBAW(AM), Barnwell, SC, is hereby advised of its Apparent Liability for Forfeiture in the amount of $5,000.00. This amount was determined by using the criteria set forth in the August 1, 1991, *Policy Statement on Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review* pending sub nom. USTA v. FCC, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these standards, $5,000 is the base amount for violation of Section 73.1206 of the Commission's Rules.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Reconsideration concerning
Liability of WPNT, Inc.

Licensee of Radio Station KXOK(FM),
Florissant, Missouri

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: January 7, 1993; Released: January 19, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a Notice of Apparent Liability (NAL) issued October 8, 1991, for the amount of $6,250.00 for a violation of 73.1216 which occurred during June and July of 1990; (2) a Forfeiture Order for payment of the $6,250.00 issued February 20, 1992; (3) a Petition for Reconsideration of the Forfeiture Order filed by WPNT, Inc., dated March 23, 1992.

2. The forfeiture was assessed for the willful and repeated violation of Section 73.1216 of the Commission's Rules. As co-sponsor of a contest called "Six Flags Hottest Dance Contest," KXOK(FM) (formerly KHTK(FM)) failed to fully disclose the material terms of the contest and misrepresented the value of the prize awarded to the second place winner of the contest. The facts are set forth in full detail in the NAL and will not be repeated here.

3. In support of its request that we rescind the forfeiture, WPNT, Inc. argues that the contest was not conducted by Station KXOK(FM), but by Six Flags Amusement Park. It states that the station simply advertised the contest for Six Flags and received promotional consideration for its role in the contest. It claims that the station sold air time and provided the stereo system as a contest prize and a disc jockey at the dance contest "in exchange for the promotional value to the station of being associated with an advertiser's contest."

4. The licensee also discusses whether it misrepresented the value of the stereo system, the second prize, in the promotional material for the contest. It points out that the value was stated only in the written rules, which were prepared by Six Flags, and that KXOK(FM) never broadcast an announcement specifying the value of any of the prizes, including the stereo system. It claims that broadcasting the value of the prizes was not required because the contest was not licensee-conducted. WPNT, Inc. asserts that KXOK(FM) obtained the prize through a $1,000.00 trade-out agreement providing air time in exchange for the stereo system. In this regard, it is apparent that the station established the value which was publicized in the contest rules, and the actual value of the stereo system was substantially less (no more that $250 - see October 3, 1991, NAL). It is also established in the Commission's Notice of Apparent Liability in this case that, since the broadcast announcements promoting the contest ommitted several pertinent facts which were included in the written rules, those announcements did not fully and accurately disclose the material terms of the contest as required by the Commission's Rules.

5. As the Commission pointed out in its October 3, 1991, Notice of Apparent Liability,[1] the licensee itself admitted in its January 18, 1991, response to our letter of inquiry that KHTK was a co-sponsor of the "Six Flags Hottest Dance Contest" along with "Famous Barr" department store and "Sound Warehouse." WPNT, Inc.'s argument that it acted merely as an advertiser of the contest in exchange for promotional value to KHTK is refuted by the facts of the case. The broadcast and written contest rules were presented in a manner which led the public to believe KHTK (Hot 97) was a co-sponsor of the contest. For example, the broadcast announcement promoting the contest stated, "The all new Hot 97, Famous Barr and Sound Warehouse *present* (emphasis added) the Six Flags Dance Contest;" and concluded with, "It's the Six Flags Hottest Dance Contest from Famous Barr, Sound Warehouse and the all new Hot 97." The written contest rules, which were attached to the licensee's Petition for Reconsideration and the complainant's further comments, presented the contest as the "$10,000 Dance Contest," and listed as apparently equal sponsors at the bottom of the page. Six Flags over Mid-America, Sound Warehouse and KHTK - Hot 97. Based on the above, the Commission maintains that as a co-sponsor of the subject contest, the licensee is responsible for compliance with Section 73.1216 of the Commission's Rules.

6. In light of the conclusion that the "Six Flags Hottest Dance Contest" was a station-conducted contest, which is discussed fully above, it is clear that a willful and repeated violation of Section 73.1216 occurred. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed March 23, 1991, by WPNT, Inc. IS DENIED.

7. IT IS FURTHER ORDERED than WPNT, Inc. SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of six thousand two hundred fifty dollars ($6,250) for willful and repeated violations of Section 73.1216 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTE

[1] It should be noted that WPNT, Inc. did not file a response or in any way acknowledge receipt of this Notice of Apparent Liability.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-275

In the Matter of

New Service Reporting Requirements
Under Price Cap Regulation

NOTICE OF PROPOSED RULEMAKING

Adopted: November 17, 1992; Released: January 19, 1993

Comment Date: March 12, 1993
Reply Comment Date: March 29, 1993

By the Commission:

I. INTRODUCTION

1. By this Notice of Proposed Rulemaking (Notice), the Commission proposes to reduce the frequency with which price cap carriers must file certain reports regarding their offering of new interstate services.[1] Such carriers are currently required to file quarterly reports comparing actual results with their earlier projections. We tentatively conclude that this requirement should be modified to require annual rather than quarterly reports. We also propose to clarify the duration of this reporting requirement.

II. DISCUSSION

2. For both AT&T and the local exchange carriers (LECs) subject to price cap regulation, rates for new services[2] must be supported by cost information that is prospective in nature.[3] While the tariff review process ensures that the forecasted cost and demand data are consistent internally and with forecasts for similar offerings, use of forecasted data makes it impossible to ensure that the supporting data are entirely accurate. The requirement that carriers report actual operating results serves several purposes. First, reporting allows us to determine if a carrier's forecasts are consistently incorrect. If this proves to be the case, future new services demand forecasts could be adjusted. Second, public reports of operating results tend to encourage carriers to make more accurate demand forecasts. The knowledge that the Commission and interested parties can compare forecasts and results guards against inaccurate forecasting.

3. New services reports serve another purpose. Price cap regulation is intended to create incentives for carriers to be innovative in the provision of service. Reporting of new services gives the Commission some perspective on whether these services have satisfied customer needs. While demand information would ultimately become aggregated with similar information for other services in the actual price index and service category band index, isolation of operating results on a service-by-service basis helps determine if the incentives created by price cap regulation are producing services that customers want. This evaluation requires information that is highly disaggregated.

4. While the information contained in these quarterly reports is useful for these evaluation purposes, we tentatively conclude that annual reports that separately report on each new service would be equally useful and less of a burden on both carriers and the Commission. First, the purposes for which these data are collected, outlined above, can be served with an annual filing. Second, because new services typically build gradually to their long run level of demand, quarterly results during the first few quarters are of limited usefulness. Third, since the initial forecasts are for an annual period, it is more consistent to require monitoring on an annual basis. Finally, there would be a slight savings in resources for both the carriers and the Commission. We therefore propose to substitute an annual reporting requirement for the current quarterly obligation.

5. In addition, the *AT&T Price Cap Order* and the *LEC Price Cap Order* each made clear that the quarterly reporting obligation for a new service commenced six months after the initiation of that service, but the termination date of this reporting obligation is unclear.[4] To assure that we will continue to receive these reports for a reasonable period after these new services are introduced, we tentatively conclude that the obligation of price cap carriers to file these new service reports should terminate after the second annual report following the inclusion of the service in price cap indexes. Carriers would be required to file new service reports on the last day of the first calendar quarter, to include all new services introduced in the last

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[1] In 1989, the American Telephone and Telegraph Company (AT&T) became subject to price cap regulation. Report and Order and Second Further Notice, 4 FCC Rcd 2873 (1989), and Erratum, 4 FCC Rcd 3379 (1989) (*AT&T Price Cap Order*), *modified on recon.* 6 FCC Rcd 665 (1991), *appeal docketed, AT&T v. FCC*, No. 91-1178 (D.C. Cir. April 15, 1991). In 1990, the largest local exchange carriers (LECs) also became subject to such regulation. Second Report and Order, 5 FCC Rcd 6786 (1990), and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for recon. of ONA Part 69 Order pending, petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA Part 69 Order*), *petitions for recon. of ONA Part 69 Order pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[2] New services are subject to special rules under price cap regulation. *See AT&T Price Cap Order*, 4 FCC Rcd at 3122 (para. 518); *LEC Price Cap Order*, 5 FCC Rcd at 6824-25 (paras. 314-320). New services are offerings that enlarge the range of services available to customers (*i.e.*, all existing service offerings remain available). Any service offering that only modifies a method of charging or provisioning a service but does not result in a net increase in the service options available to customers is defined as a restructured service. *See, e.g., LEC Price Cap Order*, 5 FCC Rcd at 6824 (para. 314).

[3] Sections 61.49(g) and (h) of the Commission's Rules, 47 C.F.R. §§61.49(g) and (h).

[4] *See AT&T Price Cap Order*, 4 FCC Rcd at 3127 (para. 528); *LEC Price Cap Order*, 5 FCC Rcd at 6825 (para. 321).

calendar year. As stated above, reports would terminate after the second annual report following the incorporation of the service into price cap indexes. Thus, new services would be subject to three annual reports.

6. We seek comment on these proposals and invite parties to submit alternative proposals.

III. PROCEDURAL MATTERS

A. Ex Parte

7. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

B. Initial Regulatory Flexibility Analysis

8. We certify that the Regulatory Flexibility Act of 1980 does not apply to these proposed changes to the rules regarding new service reports by price cap carriers because such changes, if promulgated, would not have a significant economic impact on a substantial number of small business entities as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers that would be affected by such changes generally are large corporations or affiliates of such corporations. The Secretary shall send a copy of this Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.*

C. Notice and Comment Provision

9. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 U.S.C. §§ 1.415 and 1.419, interested parties may file comments on whether the Commission should adopt the proposed changes in the reporting requirements for new services under price cap regulation on or before **March 12, 1993** and reply comments on or before **March 29, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting documents. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. Informal comments may be filed with the Chief, Common Carrier Bureau, Federal Communications Commission, Room 500, 1919 M Street, N.W., Washington, D.C. 20554. For further information, contact Allen A. Barna, Tariff Division, Common Carrier Bureau at (202) 632-6917.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 218, and 403 of the Communications Act as amended, 47 U.S.C. §§ 151, 154, 201-205, 218, 220, and 403, a NOTICE OF PROPOSED RULEMAKING IS HEREBY PROVIDED as explained herein.

11. IT IS FURTHER ORDERED that, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 U.S.C. §§ 1.415 and 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554, on or before **March 12, 1993** and reply comments SHALL BE FILED with the Secretary on or before **March 29, 1993**. In addition, parties should file two copies of any such pleadings with the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with Downtown Copy Center, the Commission's duplicating contractor, at its office in Suite 640, 1990 M Street, N.W., Washington, D.C. 20036.

12. IT IS FURTHER ORDERED that the Secretary shall cause a summary of this Notice of Proposed Rulemaking to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MEYERSVILLE SCHOOL DISTRICT
Victoria, TX — File No. BPLIF-910820DC

VICTORIA INDEPENDENT SCHOOL DISTRICT
Victoria, TX — File No. BPLIF-911113DA

For Construction Permit and License
in the Instructional Television Fixed
Service on Channels B1, B2, B3, and B4

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1993; Released: January 19, 1993

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Meyersville Independent School District (Meyersville) and Victoria Independent School District (Victoria) for a construction permit and license on Channels B1-B4 in the Instructional Television Fixed Service (ITFS). The applicants propose to serve Victoria, Texas, and the surrounding area.

BASIC ELIGIBILITY

2. Meyersville and Victoria are each qualified to be an ITFS licensee. Both are school districts accredited by the Texas Education Agency applying within their jurisdictions to provide ITFS service to their students. Consequently, both qualify as local applicants. Additionally, as part of their proposals, both applicants have proposed formal educational programming and are therefore qualified from a programming standpoint.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant in predicting which applicant would be best qualified to provide the service for which the ITFS spectrum has been established. *ITFS Second Report and Order in MM Docket No. 83-523*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by that applicant of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[2] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Meyersville and Victoria are each awarded points based on the following criteria:

Localism. Both applicants are entitled to four points because they are school districts having one or more receive sites within their respective districts.

Accreditation. Both applicants are entitled to three points for being accredited by the Texas Education Agency.

Four-Channel Limitation. Neither of the applicants is the licensee of other ITFS facilities or is applying for additional channels in their local areas other than the ones requested in the instant applications. Consequently, both applicants are entitled to two points for remaining within the four-channel limitation.

Amount of Instructional Programming. Question 5 of Section IV of FCC Form 330 requires an applicant to indicate which of its educational programming will be formal in nature. Because Meyersville has not so indicated on its illustrative schedule of programs, the per channel weekly average of 19.4 hours of educational programming specified in that schedule will be considered as non-formal for the purpose of determining merit points. In contrast, Meyersville's program grid proposes four hours of formal educational programming per channel per week. Where amounts and types of programming proposed in an applicant's schedule and grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits such a level of educational programming. In this case, however, neither the amount specified in the illustrative schedule or in the grid reach the threshold at which points are awarded. Thus, Meyersville is entitled to no programming merit points.

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[1] To be considered "local", an applicant must demonstrate that it is physically located in the community or metropolitan area where service is proposed. Additionally, an entity created by a state or local government for the purpose of serving formal educational needs is considered "local" throughout the area over which the entity's authority is intended to extend. *Second Report and Order, supra* at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

On April 17, 1992, the final opportunity for amendment of its application for comparative purposes, Victoria amended its application to reflect changes in its illustrative schedule, its grid, and its excess capacity lease. As a result of those amendments, Victoria proposes a per channel weekly average of 41 hours of formal educational programming on both its illustrative program schedule and on its programming grid. Further, the excess capacity lease, as amended, now permits such a level of programming, and Victoria is therefore entitled to two programming merit points.

E- and F-Channel Relocations. Neither of the applicants is the current licensee of E or F channels seeking to relocate to other channels. Consequently, this factor is inapplicable here.

5. Meyersville is entitled to points for being local, being accredited, and for observing the four-channel limitation, for a total of nine points. Victoria is entitled to 11 points for being local, being accredited, observing the four-channel limitation, and proposing 41 hours of formal educational programming. Thus, the tentative selectee is Victoria.

OTHER MATTERS

6. Victoria proposes to lease its excess capacity for non-ITFS use, as permitted by Section 74.931 of the Commission's Rules (47 C.F.R. Section 74.931). Victoria has submitted a copy of its lease with United States Wireless Cable, Inc. (U.S. Wireless); however, several of its provisions do not comply with the Commission's requirements for such leases. First, the lease provides for an initial term of five years or less depending on the expiration date of Victoria's license. Thereafter, U.S. Wireless is entitled to extend the agreement for up to five successive terms of five years each, constituting, in effect, a term of 30 years. This is inconsistent with the Commission's ten-year maximum for excess capacity leases. *Instructional Television Fixed Service in Gen. Dockets 90-54 and 80-113*, 5 FCC Rcd 6410, 6416 (1990). Second, although the lease provides for consultation with Victoria regarding the location of the transmission point, another provision gives U.S. Wireless the authority to dictate a change of that site regardless of the adequacy of service provided to Victoria receive locations. We view this as inconsistent with the ITFS licensee's responsibility to ensure the adequacy of its service. *ITFS Second Report and Order in MM Docket No. 83-523, supra* at 90. Finally, the lease affords U.S. Wireless the right to select a prospective assignee of the ITFS license, which impermissibly intrudes upon that which has traditionally been the right of a licensee. *Id.* at 90. None of these provisions, however, reflect adversely on the applicant's basic or comparative qualifications, nor do their presence preclude grant of an authorization. Nevertheless, Victoria's authorization will be conditioned upon conformity of the lease to Commission requirements. *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 FCC Rcd 142, 143 (1987).

7. In light of the above, we find that grant of Victoria's application would serve the public interest, convenience, and necessity.

8. Accordingly, IT IS ORDERED, That the above-captioned application of Meyersville Independent School District IS DENIED, and the above-captioned application of the Victoria Independent School District IS GRANTED, subject to the following condition:

The Victoria Independent School District shall, within 30 days of the release of this Order, submit for approval by the Chief, Mass Media Bureau, information demonstrating compliance with the Commission's requirements, including, if appropriate, an amended excess capacity lease conforming with the requirements discussed herein.

9. Further, the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-269

In re Applications of

DOROTHY O. SCHULZE and DEBORAH BRIGHAM, a General Partnership — File No. BPCT-850320KG

BLANCO COMMUNICATIONS LTD. — File No. BPCT-850320LC

For A Construction Permit
for a New Television Station,
Channel 52, Blanco Texas

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1992; Released: January 21, 1993

By the Commission:

1. This order affirms, as modified, a decision of the Review Board disqualifying Blanco Communications, Ltd. as an applicant in this proceeding. *Dorothy O. Schulze and Deborah Brigham, a General Partnership*, 7 FCC Rcd 3790 (Rev. Bd. 1992).

I. BACKGROUND

2. Blanco Communications, Ltd. (BCL) and Dorothy O. Schulze and Deborah Brigham, a General Partnership (Schulze-Brigham) are the remaining applicants in this proceeding for a new UHF television station in Blanco, Texas. A third applicant, Opal Chadwell, is no longer a party to this proceeding. To put the issue before us in context, it is necessary to review the complex procedural history of this case.

INITIAL DECISION

3. In his initial decision, Administrative Law Judge Walter C. Miller granted Chadwell's application and denied those of BCL and Schulze-Brigham.[1] *Opal Chadwell*, 1 FCC Rcd 120 (I.D. 1986). The ALJ concluded that both BCL and Schulze-Brigham made disqualifying misrepresentations during the course of this proceeding.

4. The issue now before us relates to the ALJ's disqualification of BCL. According to the ALJ, BCL's principal, Sidney Paul DeBose, lied to the Commission in describing his dealings with Chadwell concerning her original proposed transmitter site. The matter arose when BCL filed a petition to enlarge issues against Chadwell alleging that she had not contacted the owner of her original proposed transmitter site to make arrangements to locate her transmitter there. Chadwell responded that DuBose had misled her into believing that she had reasonable assurance that she could use the site, an allegation that DuBose denied.

5. The ALJ substantially accepted Chadwell's version of what had happened. The ALJ found that Chadwell had been erroneously informed that DuBose owned the site and had mistakenly approached him -- and not the actual owner of the site -- for permission to use the land.[2] The ALJ found that at an initial meeting between Chadwell and DuBose in October or early November, 1984, DuBose said that he would make the land available if Chadwell would include him as a partner in her application. According to the ALJ, Chadwell told DuBose that she would consider this but that she would like to use his site in any event. 1 FCC Rcd at 121 ¶ ¶ 12-14.

6. The ALJ found that Chadwell asked DuBose for a letter that assured her that she could use the site and that DuBose told her that there was plenty of time to do that. The ALJ further found that Chadwell pointed to a map on the wall of her office, asked DuBose if this was his land, and asked him whether she could use it. The ALJ accepted Chadwell's testimony that DuBose nodded affirmatively. 1 FCC Rcd at 121 ¶ ¶ 14-15.

7. According to the ALJ, Chadwell and DuBose had several subsequent meetings at which they discussed the possibility of partnership. The ALJ found that during these meetings, Chadwell continued to ask DuBose for a reasonable assurance letter and that DuBose would evade writing the letter, but would assure Chadwell that there was plenty of time to do this. 1 FCC Rcd at 121 ¶ 16.

8. Based on the claimed oral assurances from DuBose, Chadwell had her consulting engineer prepare the engineering portion of her application using the site she had discussed with DuBose. She thereafter filed her application on January 3, 1985. 1 FCC Rcd at 121 ¶ ¶ 16-17.

9. The ALJ found that DuBose knew that Chadwell had specified a site that she thought belonged to DuBose and that DuBose had requested from Chadwell a copy of the engineeering portion of her application. DuBose, according to the ALJ, had passed this on to an associate, Lowry Mays, who analyzed the proposal and discussed it with DuBose and Chadwell. 1 FCC Rcd at 121-22 ¶17.

10. In testimony accepted by the ALJ, Chadwell stated that a few days before March 20, 1985, the deadline for filing applications mutually exclusive with Chadwell's, DuBose visited Chadwell and told her that he was not sure that the site specified by Chadwell was actually on his property. On March 20, DuBose filed BCL's application.[3]

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[1] The disposition of the Schulze-Brigham application has been held in abeyance pending further proceedings. 7 FCC Rcd at 3794 ¶ 17.

[2] Chadwell's proposed site -- at 30 degrees 0' 58" north latitude and 98 degrees 18' 11" west longitude -- was actually about 3/4 miles from DuBose's ranch. 1 FCC Rcd at 121 ¶ 8; Tr. 1094; BCL Exh. P-II-2, Exh. A at 2-3, Exh. B. Chadwell had originally been misinformed by her husband Earl, whose mistaken impression was confirmed by Celestino Romero, a former DuBose ranch hand.

[3] DuBose and an individual named Gracia Romero are BCL's general partners, and Benjamin F. Pittman, III is BCL's limited partner.

The ALJ found that Chadwell called DuBose and asked him whether she could use his land for a transmitter site despite his filing an application. Chadwell testified that DuBose told her that he would get back to her but did not. Chadwell thereupon amended her application to specify a new site (which also eliminated a short-spacing problem). 1 FCC Rcd at 122 ¶ ¶ 18-20.

11. The ALJ found, first, that DuBose lied in denying in an affidavit and at the hearing that he had verbally assured Chadwell that she could use his land and, second, that he had led her on until he could form his own applicant and use Chadwell's mistake against her. 1 FCC Rcd at 122 ¶ ¶ 21-22. Specifically, the ALJ found that DuBose had lied when he swore that: (1) he had not nodded affirmatively that a site pointed out by Chadwell was on his land and that Chadwell could use it; (2) he had never verbally assured Chadwell that she could use his land, and Chadwell never asked for a letter nor did DuBose agree to provide one; and (3) at no time after Chadwell filed her application did he know that she had specified a site that she thought was on his property. *Id.* at 122 ¶ ¶ 23-24.

12. In concluding that Chadwell had been truthful and that DuBose had dissembled, the ALJ made findings concerning their credibility. The ALJ stated:

> Having observed the demeanor of Mrs. Chadwell and Mr. Dubose, the Presiding Officer has selected Opal Chadwell's version of the facts. . . . She has factually detailed the events underlying the conflict. Her testimony is basically consistent and corroborated by her husband's sworn testimony.[4] | There is no reason for not crediting her version of the past events. On the other hand, the Presiding Officer wasn't favorably impressed with Sidney Paul DuBose's testimony. His answers didn't fit together. He was weak on details, and his sense of recall was incredibly poor . . . . In fact, at the hearing, once additional details were brought out, the Presiding Judge got the distinct impression that DuBose was stringing Mrs. Chadwell along; i.e., he was pretending to be favorably considering letting Mrs. Chadwell use what she thought was his land for a transmitter so he'd have time to prepare and file a competing application. But he knew all along that she had specified coordinates that wasn't his land.

1 FCC Rcd at 121 ¶ 10.

PROCEEDINGS ON REVIEW

13. On appeal, the Review Board agreed with the ALJ's findings and conclusions. *Opal Chadwell,* 2 FCC Rcd 5502 (Rev. Bd. 1987). In this regard, the Board, following established practice, gave deference to the ALJ's credibility findings. *Id.* at 5504 ¶ 12-13.

14. The Commission did not disturb the findings and conclusions below concerning BCL's disqualification. *Opal Chadwell,* 4 FCC Rcd 1215 (1989). However, the Commission found that the record before it raised questions as to Chadwell's financial qualifications that required remand. The Commission observed that the outcome of the remand proceeding might have relevance to the issue of BCL's qualifications. The Commission stated:

> We see no basis on the present record . . . to modify the conclusions of the ALJ and the Review Board. However, if the record on remand indicates that Chadwell has falsely certified her financial qualifications or has lacked candor, this may reflect on her credibility under other issues and the ALJ might reconsider his findings if appropriate. Again, however, we emphasize that we are not prejudging this matter, but merely indicating that the ALJ has the discretion to act *if* circumstances warrant. Consequently we reserve final judgment on these issues pending any further relevant action by the ALJ.

4 FCC Rcd at 1217 ¶ 21. (Emphasis in the original.)

15. Following remand, the ALJ added false certification and lack of candor issues against Chadwell. During the preliminary phase of the remand hearings, Chadwell failed to participate in discovery and the ALJ dismissed her application for failure to prosecute. *Opal Chadwell,* FCC 89M-1568 (Jun. 2 . 1989).

16. Subsequently, in response to a petition by BCL, the Commission expressed concern that the dismissal of Chadwell's application left unresolved questions that might bear on her credibility. *Dorothy O. Schulze and Deborah Brigham, a General Partnership,* 5 FCC Rcd 3227, 3228-29 ¶ ¶ 17-21 (1990). The Commission therefore considered it appropriate to give BCL an opportunity in further proceedings to explore Chadwell's financial certification and failure to prosecute to determine whether they had a bearing on her character and hence her credibility. The Commission remanded the matter to the ALJ to determine whether the recent events had undermined her credibility.

SUPPLEMENTAL INITIAL DECISION

17. In his supplemental initial decision, the ALJ found that Chadwell committed serious misconduct. *Dorothy O. Schulze and Deborah Brigham, a General Partnership,* 6 FCC Rcd 7419 (I.D. 1991). He found that the documentation that Chadwell produced to support her financial qualifications was lacking in candor and contained numerous overt misrepresentations. He also found that Chadwell had interfered with discovery to conceal her misconduct. The ALJ found that Chadwell had a "propensity to overshade the facts" and that she was a "malicious and vindictive person." *Id.* at 7424 ¶ 13, 7425 ¶ 15.

18. Nonetheless, the ALJ did not modify his assessment of Chadwell's credibility vis-a-vis Dubose. In his view:

> It is a *non sequitur* to assume that because Opal Chadwell misrepresented her *financial* qualifications to the Commission during the administrative appellate process in 1988, she must also have lied about the availability of her *transmitter site* at the original hearings in 1985-86. Nor is there any discernible nexus between the Trial Judge's original adverse de-

[4] The ALJ also found that Earl Chadwell was forthright and honest. According to the ALJ, Earl Chadwell was not hesitant or evasive, was reasonably certain of his answers without being flippant, and was cooperative. 1 FCC Rcd at 132 n.7.

> meanor findings on Sidney Paul DuBose . . . and the record we have developed on witness Opal Chadwell at this second remand.
>
> . . . .
>
> Nothing that has been developed at this remanded hearing impacts on the original DuBose findings and conclusions and the two affirmances of those findings and conclusions. . . .

6 FCC Rcd at 7425 ¶ ¶ 17, 21. (Emphasis in the original.)

19. The Board affirmed the supplemental initial decision. *Dorothy O. Schulze and Deborah Brigham, a General Partnership*, 7 FCC Rcd 3790 (Rev. Bd. 1992). The Board rejected BCL's argument that Chadwell's testimony should be disregarded under the doctrine of *falsus in uno, falsus in omnibus* (false in one thing, false in everything). The Board noted that the ALJ had made specific demeanor findings (in his original initial decision) and had found that nothing developed in the second hearing had an impact on the original DuBose findings and conclusions. Accordingly, the Board continued to defer to the ALJ's credibility findings. The Board also found that DuBose's actions buttressed the ALJ's findings and conclusions, since DuBose knew of the availability of channel 52 and formed his own group at the last minute.

II. APPLICATION FOR REVIEW

20. BCL faults the Board for ignoring the impact of Chadwell's financial misrepresentations on the trustworthiness of her testimony concerning DuBose. According to BCL, these numerous and egregious misrepresentations undermine Chadwell's credibility and make her testimony concerning DuBose unworthy of belief. BCL accuses the Board of failing to take into account the Commission's concerns in this regard. BCL asserts that the record as a whole demonstrates that DuBose testified truthfully about his dealings with Chadwell. BCL urges the Commission to conduct an independent review of the record and reverse the ALJ's credibility findings.

III. DISCUSSION

21. The ALJ's acceptance of Chadwell's testimony was crucial to his conclusion that DuBose committed disqualifying misrepresentations and to the Board's affirmance of that conclusion. The ALJ's action depended, in turn, on his evaluation of Chadwell's credibility vis-a-vis that of DuBose. Because of the critical role that Chadwell's credibility has in this case, it was appropriate for the ALJ to scrutinize her testimony in light of every matter in evidence that tends to indicate whether she is worthy of belief. *See United States v. Schneiderman*, 106 F. Supp. 906, 929 (S.D. Cal. 1952). Evidence as to Chadwell's character for truthfulness or untruthfulness is one relevant factor. *See* Fed. R. Evid. Rule 608.

22. Thus, where a witness has testified falsely as to one matter, the following rule applies in the federal courts:

> It is not true that a jury must exclude the testimony of somebody who has told a lie. You may think, if you want to, that a person who is false in one respect is false in all, or you may, on the contrary, say a person is false in one respect but believable in others. It is just a question of your own common sense applied to the particular testimony which is offered.

United States v. Interstate Engineering Corp., 288 F. Supp. 402, 415 (D. N.H. 1967). *See also Norfolk v. W. Ry. Co. v. McKenzie*, 116 F.2d 632, 635 (6th Cir. 1941); Wigmore on Evidence § 1010 at 984 (1970 ed.).

23. In remanding this case to the ALJ, we anticipated that he would make such a determination in view of any adverse findings concerning Chadwell. For example, the ALJ's finding that Chadwell had a "propensity to overshade the facts" (6 FCC Rcd at 7424 ¶ 13) might conceivably have led him to alter his assessment of Chadwell's credibility with respect to DuBose. We note in this regard that in his original credibility findings the ALJ noted, among other things, that "[t]here is no reason for not crediting [Chadwell's] version of the past events". 1 FCC Rcd at 121 ¶ 10. The ALJ could have determined that a propensity to lie demonstrated during the remand hearing was such a reason.

24. Nonetheless, it was within the ALJ's sound discretion to conclude, as he did, that findings he made in the remand hearing did not impeach Chadwell's credibility vis-a-vis DuBose. Our review of the supplemental initial decision does not, however, clearly reveal that, in reaching this result, the ALJ made a determination consistent with the rule of *Interstate Engineering*. Rather, some language in the supplemental initial decision suggests that the ALJ believed that evidence regarding Chadwell's character developed in the remand hearing had no potential relevance to her credibility vis-a-vis DuBose.[5]

25. In view of the foregoing, we have reviewed the record to determine whether we are warranted in relying on Chadwell's testimony despite the questions that have arisen about her credibility.[6] We conclude that, although some aspects of her testimony about the transmitter site are open to question, her account overall is credible. We will therefore reaffirm the disqualification of BCL.

26. Our questions regarding Chadwell's testimony concern her description of the initial meeting with DuBose at which DuBose supposedly gave her both oral assurance that she could use his ranch as a transmitter site regardless of whether they formed a partnership and a promise to provide a letter of assurance. DuBose denied these claims.

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[5] "The short answer to these BCL contentions [that questions concerning Chadwell's credibility remained unresolved] should have been a resounding 'so what?'" 6 FCC Rcd at 7425 n.3. "Chadwell subsequently pointed out that her credibility is irrelevant to BCL's (Dubose's) basic qualifications. . . . The Trial Judge agreed . . . . " *Id.* at 7425 n.5. "Why we need to impeach an applicant's credibility once the application in question has been dismissed remains a mystery." *Id.* at 7425 n.7.

[6] We cannot assume that the substance of Chadwell's testimony is true solely because we may doubt DuBose's credibility. The disbelief of a witness alone does not support a finding that the opposite of what that witness testified is true. *See United States v. Yunis*, 859 F.2d 953, 960 (D.C. Cir. 1988).

Tr. 1040-42; BCL Exh. P-II-2, Exh. A at 1-2. Both Chadwell and DuBose testified that DuBose regarded use of the ranch as a "bargaining chip" in their partnership negotiations. Tr. 1095, 1335. Moreover, Chadwell admitted that there was no discussion of such particulars as the amount of land that would be required, how long it would be used, site access, whether the land would be leased or purchased, or how much would be paid. Tr. 1314, 1316, 1324.[7] Under these circumstances, a conclusion that DuBose would be willing to give Chadwell firm assurance so casually is problematic.

27. Indeed, Chadwell does not report specific language by DuBose indicating such assurance. Rather she relies principally on her assertion that DuBose "nodded" affirmatively when she asked whether she could use his land. Tr. 1149, 1298, 1300-1311; Chadwell Exh. P-II-1 at 2; Chadwell Exh. P-II-2.[8] Although Chadwell claims that DuBose promised to give her a letter of assurance,[9] the thrust of her testimony is that he was never actually willing to give her one.[10] Especially given the subsequent finding that Chadwell has a "propensity to overshade the facts", the foregoing fails to substantiate that DuBose actually gave Chadwell the assurances that she claimed.

28. This shortcoming is overcome, however, by our examination of the record concerning the principals' subsequent conduct. We believe that the record amply illuminates both the respective credibilities of Chadwell and DuBose and their states of mind at the relevant time. We agree with the ALJ that there is a striking disparity between the quality of Chadwell's testimony and that of DuBose.[11] As the ALJ noted, Chadwell's testimony is detailed and coherent, while DuBose's is vague and incomplete. We find that, regardless of whether DuBose technically gave Chadwell reasonable assurance for use of his ranch, he was aware that Chadwell was specifying a site that she believed was on his ranch and he acquiesced in that conduct for as long as it served his purposes.

29. Turning to other aspects of the record, we find that following her meeting with DuBose (in October or early November, 1984), Chadwell told her consulting engineer that she had a transmitter site and instructed him to prepare the engineering portion of her application, which is dated November 19, 1984. Tr. 1151-52, 1169-70, 1327-29; Chadwell Exh. P-II-12 at 7. She filed her application on January 3, 1985. BCL Exh. P-II-1, Exh. A.

30. Chadwell described in detail what occurred thereafter, beginning with a second meeting that she had with DuBose in late January or early February. According to Chadwell, she initially met with DuBose in mid-morning in an office in Johnson City, Texas. She testified that she again sounded DuBose out about his becoming a partner and offered to provide him with the engineering portion of the application for him to study. Tr. 1155-58. (DuBose testified that he expected Chadwell to provide him with additional information after their first meeting. Tr. 1043-44.) She further testified that DuBose expressed interest but suggested that another individual, Lowry Mays, be brought in, and asked to see the engineering proposal. Tr. 1159-60.

31. Chadwell then stated that, because she did not have the engineering exhibit in Johnson City, she again met with DuBose in the evening in her office in Blanco. Chadwell testified that in Blanco she told DuBose that they needed to have a firm understanding about their partnership agreement and asked for a letter of assurance. She stated that she gave DuBose a copy of the engineering exhibit. Tr. 1160-61, 1165, 1171-73. She further stated that DuBose promised to set up a meeting with Mays and to show him the engineering.

32. According to Chadwell, DuBose set up an initial meeting in Mays' office, which was aborted because Mays proved unavailable. Tr. 1173. (DuBose agrees with this account of the initially scheduled meeting with Mays. Tr. 1051-52.)

33. DuBose subsequently arranged for a second meeting in Mays' office. Mays, Chadwell and her husband, and Benjamin F. Pittman, III (now BCL's limited partner) attended the meeting. DuBose, who was in Hawaii at the time, participated by telephone. Tr. 954, 1053-54, 1174. Extrinsic evidence, indicating that DuBose was in Hawaii from February 16 to February 26, 1985, corroborated Chadwell's recollection that the meeting occurred in mid-February, 1985, more than a month after she filed her application. Tr. 1692.[12]

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[7] DuBose's wife, Patricia, recalled a discussion with her husband after DuBose met with Chadwell. Tr. 993-95. Patricia DuBose testified that her husband told her that he and Chadwell had not gotten to the point in negotiations of specifying such particulars. Tr. 995.

[8] Chadwell's testimony is contradictory as to whether DuBose made further affirmative statements. Chadwell's husband, Earl, testified that he overheard part of the conversation between Chadwell and DuBose. His testimony is equivocal as to the significance of DuBose nodding his head. *Compare* tr. 1429-30 (nod indicated that Chadwell could use the land regardless of whether she and DuBose became partners), tr. 1430 (Chadwell could use the land if she and DuBose became partners), tr. 1460-61 (nod only indicated that the land belonged to DuBose).

[9] Earl Chadwell's testimony does not confirm that DuBose promised to furnish a letter, only that DuBose indicated "that would have to happen at a later date." Tr. 1428-29, 1461.

[10] Chadwell admitted that she did not ask DuBose for a letter on the two occasions when individuals other than her husband were present. Tr. 1321. She had originally stated that she asked DuBose for a letter "[e]ach and every time we met." Chadwell Exh. P-II-1 at 3.

[11] In this regard, another matter tends to corroborate Chadwell's account. Chadwell testified that, at her meeting with DuBose, she pointed to the location of her proposed transmitter site on a map on her office wall. DuBose denied that she did this. Tr. 1042; BCL Exh. P-II-2, Exh. A at 1. Indeed, DuBose testified that he did not recall seeing any maps on the walls. Tr. 1037-38. However, Chadwell introduced a map indicating the site into evidence and was extensively examined concerning the map. Chadwell Exh. P-II-11; tr. 1113-27, 1136-40. We agree with the ALJ that Chadwell's testimony concerning the map is credible, that the map is authentic, and that the map corroborates Chadwell's account, since Chadwell likely would have pointed to an easily accessible map indicating the site. 1 FCC Rcd at 131 n.11.

[12] Additionally, Chadwell testified that she informed DuBose of the Commission's acceptance of her application at that time. Tr. 1205. She stated that Mays wished to defer meeting until after her application had been accepted. Tr. 1205. She further testified that, although she had not been notified of acceptance at the time of the first, aborted, meeting with Mays, her counsel told her of acceptance, in time for the second meeting. Tr. 1199, 1205-06. The date of the meeting in Mays' office is generally consistent with the main points of this account, since Chadwell's application was accepted February 14, 1985.

34. Chadwell recalled that Mays and DuBose had an extensive discussion about engineering. Tr. 1175-78. According to Chadwell, they discussed a report prepared by Mays' engineer (a man named Furr) that disagreed with the computations made by Chadwell's engineer and also suggested that a different transmitter site be used.[13] Chadwell testified that she later obtained a copy of the Furr report from DuBose's wife. Tr. 1189-90. That such a report existed was confirmed when a copy was produced at the hearing. The report was dated February 7, 1985, before the meeting, but after Chadwell filed her application. Tr. 965, 969. Chadwell further testified that DuBose asked Mays to work up a partnership agreement but that Mays put him off. Tr. 1177-78. Chadwell indicated that she called DuBose in Hawaii a few days later to tell him that she opposed Mays' participation in the project. Tr. 1180-82. Telephone records confirmed that Chadwell called Hawaii on February 20, 1985. Tr. 1692.

35. DuBose's version of the events following their first meeting is less convincing. He acknowledged that he had a second meeting with Chadwell concerning "the deal." Tr. 1046. He denied, however, that Chadwell asked him for a letter of assurance or that he received a copy of her engineering. Tr. 1047, 1050. DuBose, however, did not convincingly explain when he did learn of Chadwell's application or when he first saw her engineering proposal. Tr. 1071, 1073, 1081-82, 1093-94.[14] Moreover, DuBose acknowledged, consistent with Chadwell's account, that he subsequently set up a meeting with Mays for Chadwell. Tr. 1051.

36. More importantly, DuBose's account of the significant second meeting is flawed. DuBose indicated that he did not know when the meeting took place or whether it was before or after Chadwell filed her application, and that he did not remember when he went to Hawaii. Tr. 1047-48, 1051, 1056.[15] DuBose disclaimed knowledge of the Furr report,[16] although he was aware of Furr's views on transmitter site location. Tr. 1055-57, 1071-72. He claimed instead that he had spoken to Furr over the phone on one occasion, but could not recall when. Tr. 1072.[17] DuBose denied that the question of participation was discussed at the meeting, but he did not deny that he wanted a partnership agreement prepared; he merely said that he could not recall saying that. Tr. 1059-60.

37. We agree with the ALJ that Chadwell's account is persuasive, consistent with the available extrinsic evidence, and reflects a logical course of events. DuBose's contrary testimony is vague, marked by memory lapses, and is unlikely given all of the surrounding circumstances. For these reasons, we find that, once Chadwell filed her application, she disclosed her engineering proposal to DuBose in the course of their negotiations and that DuBose considered this proposal and was aware of its contents.[18] The fact that DuBose treated Chadwell's use of his ranch as a "bargaining chip" also raises a reasonable inference that DuBose was aware that the site Chadwell had proposed was the same one that she had sought his permission to use.[19] Thus, the record supports the conclusion that DuBose knew of and acquisced in Chadwell's specification of a site that she believed was on his property.[20]

38. Chadwell also gave cogent testimony concerning events that happened at the time BCL filed its application on March 20, 1985. Chadwell stated that she first learned of the BCL application from her communications counsel and that DuBose did not contact her about BCL's application until after it had been filed. Tr. 1202-03.[21] According to Chadwell, DuBose stated that, even then, he was willing to deal with her and offered her a five percent interest. *Id.*

39. Chadwell testified that later she called DuBose and asked him if his ranch was still available to her in light of the BCL application. Tr. 1203-04. She stated that DuBose told her that he would consult Pittman and would get back to her, but never did. Chadwell therafter amended her transmitter site on May 6, 1985. BCL Exh. P-II-1, Exh. F.

40. Pittman's testimony is consistent with Chadwell's in indicating that Chadwell had no warning of the impending BCL application. He testified that DuBose suggested filing an independent application in view of the approaching cutoff date since they had not reached a deal with Chadwell. Tr. 989-90. He was aware, however, of no decision to break off discussions with Chadwell or to force her to a

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[13] There is an exception to Chadwell's claim that DuBose discussed the nature of her site proposal. Chadwell admits that she never discussed with DuBose the short-spacing problem concerning her proposed site that was disclosed in her application. Tr. 1334.

[14] DuBose testified that by the time BCL's application was filed his consulting engineer "probably" told him the location of Chadwell's proposed transmitter site over the telephone. Tr. 1094.

[15] BCL's Pittman also could not recall whether the meeting was before or after Chadwell filed her application. Tr. 970.

[16] DuBose answered no when asked: "Didn't anyone ever tell you that Mr. Furr made reference to Mrs. Chadwell's application in that report?" Tr. 1072.

[17] Pittman insisted that the Furr report was prepared after the meeting and was not discussed at the meeting. Tr. 958-959, 961-62, 966. As noted, the date of the report indicates that it was prepared before the meeting.

[18] Chadwell's engineering proposal contained a map that clearly indicated the location of her proposed site. Chadwell Exh. P-II-12 at 13; BCL Exh. P-II-2, Exh. B.

[19] Pittman testified in connection with the Mays meeting that, based on his earlier conversations with DuBose, he understood that Chadwell "was requesting to put a tower, erect a tower on Mr. DuBose's ranch." Tr. 956-57. He said that the request had been made "quite some time previous to this . . ." Tr. 956. He claimed that at the time of the meeting Chadwell "did . . . not have a location for her tower." Tr. 968.

[20] BCL's contrary view relies in part on testimony by DuBose's wife that, based on her attendance at a subsequent meeting with the Chadwells, she had no sense that DuBose had made a commitment to Chadwell for her to put a tower on DuBose's ranch. Tr. 1001-02. The Chadwells acknowledge that this meeting involved only a "general conversation" and did not specifically deal with the transmitter site matter. Tr. 1188, 1434. (In this regard, DuBose knew that his wife was strongly opposed to having a tower on their ranch. Tr. 998.) Thus, there is no direct conflict between the Chadwells and Patricia DuBose on this point.

[21] Although, according to Chadwell, DuBose gave her no prior warning that he was pursuing his own application, she related an incident indicating a change in DuBose's attitude toward her. Chadwell testified that a few days before BCL filed its application DuBose visited her and stated cryptically that he was not sure that Chadwell's proposed transmitter site was actually on his ranch. Tr. 1200-01. DuBose denied that any such incident took place. Tr. 1086.

determination. Tr. 990-91. Rather, he said that the decision to break off with Chadwell might have been made after the BCL application was filed. *Id.*

41. DuBose was vague as to his decision to file his own application. DuBose testified that he could not recall when he hired communications or engineering counsel, only that it was probably within thirty days of the March 20, 1985 cutoff for filing competing applications. Tr. 1081.[22] DuBose acknowledged that Chadwell called him concerning use of his ranch for a transmitter site after the BCL application had been filed and that he responded that he would "think about it." Tr. 1086-87. He said that he "assumed" that Chadwell called because she wanted to amend her application to specify DuBose's ranch (as opposed to being aware that her current site was on his ranch). Tr. 1087.

42. Because the record as a whole indicates that Chadwell did mistakenly believe that her proposed site was on DuBose's ranch (1 FCC Rcd at 121 ¶ ¶ 12-13), that she had no warning that DuBose intended to file his own application, and that she did not seek to amend her application until after talking to DuBose, her testimony that she called DuBose to inquire as to the ranch's continuing availability is credible. There is no similar support for DuBose's asserted assumption that Chadwell called him because she wanted to change her site rather than wanting to retain it.[23] Thus, we find that DuBose's admission that he told Chadwell that he would "think about" letting her use his ranch is further evidence of his willingness to accept Chadwell's specification of a site she believed was on his property for as long as it suited his purposes.[24]

43. In sum, although it is unclear to what extent DuBose actually gave assurance to Chadwell at their initial meeting or whether there was any "reasonable assurance" by Commission standards, both Chadwell and DuBose proceeded as if some understanding existed. Moreover, the record indicates that DuBose was informed that Chadwell had filed an application specifying a site that she thought was on his ranch and that DuBose did not take any steps to object to this. Thus, a conclusion is warranted that Chadwell did ask for a letter of assurance, as she claimed,[25] and that she specified a transmitter site that she thought was on DuBose's ranch based on her belief that DuBose was agreeable to this action. In this regard, having reviewed the entire record, we find that despite the subsequent adverse findings concerning Chadwell's financial proposal and the resulting questions that have arisen about Chadwell's veracity generally, her account with respect to the matters before us is credible, and indeed, as the ALJ stated, substantially more credible than DuBose's.

44. We therefore conclude that DuBose's sworn statements that he did not give any assurance to Chadwell concerning herproposed transmitter site[26] and that he was unaware of the nature of her proposal are false and misleading. We agree with the ALJ and the Board that such misrepresentation and lack of candor fully supports the conclusion that BCL is not qualified to be a Commission licensee and that its application for a new television station in Blanco, Texas should be denied.

IV. ORDERS

45. ACCORDINGLY, IT IS ORDERED, That the Application for Review of Blanco Communications, Ltd., filed July 15, 1992, IS GRANTED to the extent indicated herein and otherwise IS DENIED; and that the decision of the Review Board FCC 92R-44 (June 15, 1992) (7 FCC Rcd 3790) IS MODIFIED as indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[22] DuBose stated: "In part, due to problems I perceived in the management and operation of [Chadwell's unrelated low power television venture, which Chadwell and DuBose also discussed], I became increasingly convinced I did not wish to participate in Ms. Chadwell's application. Therefore, I decided to become part of a separate entity . . . . " BCL Exh. P-II-2, Exh. A at 3. *But see* Pittman's testimony at paragraph 40, above.

[23] In this regard, BCL speculated in its petition to enlarge that "[i]f the site that [Chadwell] proposed in her application had not been potentially short-spaced . . . she may very well not have amended the application . . . to specify a different non-short-spaced site." BCL Exh. P-II-1 at 2 n.*. Chadwell, however, had known about the short-spacing problem, which was raised in her engineering proposal, since November, 1984. Tr. 1329-32; Chadwell Exh. P-II-12 at 22. Yet, she did not seek an alternative site until after her discussion with DuBose in March 1985; she sought a waiver instead. *Id.* These circumstances indicate that the discussion with DuBose and not the short-spacing problem prompted Chadwell to seek a new site.

[24] BCL's petition to enlarge issues, which challenged the availability of Chadwell's original site was filed five months after she amended her site. BCL Exh. P-II-1 at 1-3. BCL did not give any explanation of what caused it to conduct its investigation of Chadwell's original site, which leaves a reasonable inference that it was because DuBose already knew of her error. *See* note 21, above.

[25] Chadwell testified that she recalled asking DuBose for a transmitter site letter on four occasions: (1) at their first meeting, (2) the day that Chadwell gave DuBose her engineering proposal, (3) when Chadwell called Hawaii, and (4) at a meeting in which DuBose discussed a report by a consultant named Freulich. Tr. 1184-85, 1322-23. (DuBose acknowledged that he consulted Freulich. Tr. 1097-98.) As discussed in note 10, above, the change in Chadwell's testimony raises some doubt about these claims. On balance, however, because we find Chadwell's testimony concerning events after the filing of her application generally credible and because these claims are consistent with Chadwell's actions prosecuting an application specifying the site in question, we credit these claims.

[26] In his sworn declaration accompanying a BCL pleading, DuBose variously stated that: (1) "I [did not] give any oral assurance my property could be used; (2) "I never gave verbal affirmation that Ms. Chadwell could use my ranch for her tower; and (3) "I never gave her assurance she could use my ranch." BCL Exh. P-II-2 at 1-3. He further swore that if Chadwell had shown him the site of her proposed transmitter: "I would have unequivocally indicated it was not on my land. Furthermore, I would never have agreed to allow Ms. Chadwell to specify a site along the Little Blanco River [the location of her proposed site]." *Id.* Read as a whole, it is clear that the import of DuBose's declaration was that he had never given Chadwell any form of assurance. In light of our conclusion that the preponderance of the evidence establishes that DuBose's conduct conveyed such assurance, it is not critical to determine the precise content of DuBose's conversations with Chadwell.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture	**CC Docket No. 89-79**
Filing and Review of Open Network Architecture Plans	**CC Docket No. 88-2**

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1992; Released: January 19, 1993

By the Commission:

1. In the *Part 69/ONA Order*, the Commission required the Bell Operating Companies (BOCs) to file federal tariffs for the basic service elements (BSEs) listed in their amended Open Network Architecture (ONA) plans, and to do so by November 1, 1991.[1] Although each BOC filed a set of ONA tariffs by that date, no BOC tariffed all of the BSEs listed in its amended plan. In particular, Pacific Bell requested a waiver to refrain from tariffing twelve different services. In the *ONA BSE Withdrawal Order*, the Chief, Common Carrier Bureau acted on the BOCs' waiver requests, and denied all twelve of Pacific's requests.[2] Pacific filed an application for review, challenging this Bureau *Order* as inconsistent with the Commission's ONA requirements.[3] We deny Pacific's application for review.

2. Pacific makes four arguments in support of its request to refrain from filing federal tariffs for the twelve ONA services included in its waiver request. First, Pacific argues that there is insufficient interstate demand for the services to justify tariffing them. Second, it asserts that while the twelve services are compatible with intrastate access arrangements, they are not compatible with interstate access arrangements. Third, Pacific argues that the ONA tariffing requirements only require Pacific to file federal tariffs for services compatible with *existing* interstate access arrangements. Finally, Pacific claims that, under the Communications Act's regime of carrier-initiated tariffs, the Commission does not have authority to require federal tariffing of specific new services.

3. We reject the first two arguments on procedural grounds and on the merits. As the AICC points out, Pacific did not request waivers for the twelve services it identified on the grounds of insufficient interstate demand or due to technical incompatibility between those services and any interstate access arrangement. Therefore, the Bureau did not evaluate any evidence on these issues. Under section 1.115(c) of the Commission's rules, we will not grant an application for review that relies on questions of fact upon which the Bureau has had no opportunity to pass.[4] Therefore, we reject Pacific's first two arguments on procedural grounds.

4. In the alternative, we also reject the two arguments on the merits. First, with regard to the argument that there is insufficient interstate demand for each of the services, Pacific faces a high burden of proof, because we look with disfavor on such arguments with respect to ONA services included in approved BOC ONA plans.[5] Pacific offers nothing more than its own unsupported statement as its proof that there is insufficient demand, and it has failed to justify a waiver.

5. Pacific's argument concerning the incompatibility of the twelve services with interstate access arrangements is also inadequate on the merits. Pacific asserts that the Bureau has ignored the Commission's statement that BSEs were to be tariffed in "the appropriate state *or* federal jurisdiction."[6] Pacific infers that it need not federally tariff services that it has included in state tariffs. This inference is inconsistent with the relevant portion of the *BOC ONA Order* that Pacific itself quotes: "any offering of BSEs . . . must be made available in the interstate tariffs *when such BSEs are technically compatible with interstate access arrangements.*"[7] Moreover, Pacific does not explain why it

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[1] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order*); Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order*), *Erratum*, 5 FCC Rcd at 4045, *pets. for recon. pending, pets. for rev. pending*, California v. FCC, (9th Cir. No. 90-70336, filed July 5, 1990); 6 FCC Rcd 7646 (1991) (*ONA Further Amendments Order*) *pet. for review pending*, MCI Telecommunications Corp. v. FCC and USA (9th Cir. No. 92-70189, filed Feb. 19, 1992).

[2] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, CC Docket Nos. 89-79 and 88-2, 7 FCC Rcd 811 (1992) (*ONA BSE Withdrawal Order*).

[3] AT&T, MCI, and the Alarm Industry Communications Committee (AICC) filed oppositions to the application and Pacific filed a reply to those oppositions.

[4] 47 C.F.R. §1.115(c) (1991).

[5] In accordance with this policy, the Bureau has granted only two waivers on the grounds of insufficient interstate demand. *ONA BSE Withdrawal Order*, at 812 para. 5; Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order on Reconsideration, CC Docket Nos. 89-79 and 88-2, 7 FCC Rcd 7241, 7244, para. 21 (1992) (*Second ONA BSE Withdrawal Order*).

[6] Pacific App. at 3-4, citing Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, Report and Order, 104 FCC 2d 958, para. 217 (1986).

[7] Pacific App. at 4, citing Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, Memorandum Opinion and Order, 4 FCC Rcd 1 (1988) (*BOC ONA Order*);

believes that the twelve BSEs identified in its waiver petition are neither technically compatible with an interstate BSA nor feasible in an interstate environment. Again, Pacific's bald assertion, without any further explanation, does not provide us with sufficient grounds for granting a waiver.

6. Pacific's two other points were raised in its waiver request, but we agree with the Bureau that neither argument justifies a waiver. Pacific argues that the Commission's federal BSE tariffing requirement only requires BOCs to "file interstate tariffs for BSEs in their ONA plans that are 'technically compatible' with *existing* interstate BSAs."[8] Pacific asserts that, because it had not yet tariffed the interstate dedicated network access link (DNAL) BSA that was compatible with the BSEs at issue, it did not have an existing interstate BSA that was compatible with the BSEs at issue. Pacific argues that the Part 69 rules did not even permit it to tariff that compatible interstate DNAL BSA without a waiver. Therefore, Pacific asserts that the tariffing requirements do not compel the BSEs that required a new interstate DNAL BSA to be federally tariffed.

7. Pacific's argument mischaracterizes our requirements by reading into one of them the additional word "existing." Although Pacific's analysis relies heavily upon the word "existing," the relevant portion of the *BOC ONA Order*, quoted by Pacific and discussed above, in paragraph 5, does not include that word. Moreover, the Bureau and five other BOCs correctly read this passage as applying broadly to all technically compatible interstate access arrangements. No other BOC inferred that the application of this passage is limited to existing access arrangements. Furthermore, Pacific offers no reason why it would be good public policy to narrow our requirements by including the word "existing." The BSE tariffing requirement applies to BSEs that are technically compatible with some form of interstate access arrangement, whether or not that arrangement is already tariffed.

8. As MCI observes, the ONA process -- which permits ESPs to make requests for new BSEs, for example, via a 120-day process -- is ongoing.[9] If a new BSE is requested, is compatible with some form of interstate access arrangement and satisfies the other elements of the four-pronged test for a new BSE, we expect the BOC to tariff that BSE. Although the point was omitted from Pacific's misquotation of the Bureau's *ONA BSE Withdrawal Order*, the order indicated that five other BOCs understand that our requirement implies the commitment to file tariffs for the necessary interstate access arrangement, if it is not already tariffed.[10]

9. Pacific's fourth and final point is that the Communications Act does not authorize the Commission to order the tariffing of specific new services, and that the requirement to tariff new BSEs is therefore an unauthorized action. Pacific's argument is unpersuasive. The *Part 69/ONA Order* simply implemented the Commission's *BOC ONA Reconsideration Order* approving the amended BOC ONA plans. The BSEs that Pacific is required to tariff are the BSEs that it proposed in its amended ONA plan. The Commission did not require Pacific to include any particular services in that plan. Pacific itself selected the services after holding meetings with enhanced service providers and examining other BOC ONA plans. The Commission order only required Pacific to implement its ONA plan. Such action is authorized by the Communications Act.[11] In particular, Section 201(a) of the Act, 47 USC §201(a), imposes a continuing obligation on Pacific to provide services upon reasonable request, and the Commission may enforce that obligation.

10. In addition, the issue of whether the Commission has authority to require the *federal* tariffing of BSEs has been thoroughly discussed and affirmed by the Commission in prior orders.[12] Under sections 2(a), 3(a), and 3(b) of the Communications Act, the Commission has the authority to regulate all interstate and foreign communication by wire or radio, including "all instrumentalities, facilities, apparatus, and services . . . *incidental to such transmission*."[13] The Commission has specifically found that the BSEs are network services that fall within the definition of "wire communication" as "incidental" to an underlying transmission.[14] Furthermore, we also said that "Section 203 of the Act relates to the filing of tariffs 'for interstate and foreign wire and radio communication.' Because interstate BSEs are interstate communication services, this section gives us the authority to include charges for BSEs used in connection with interstate transmission in interstate tariffs."[15] Therefore, there is no basis for Pacific's claim that the Commission lacks authority to require the filing of federal tariffs for BSEs described in Pacific's ONA Plan and used with interstate access arrangements.

11. Accordingly, IT IS ORDERED that Pacific's application for review of the *ONA BSE Withdrawal Order* is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 3084, para. 43 (1990) (*BOC ONA Reconsideration Order*) (emphasis added by Pacific).

[8] Pacific App. at 2 (emphasis added).

[9] MCI Opp. at 4-5.

[10] *ONA BSE Withdrawal Order*, at 816, para. 27.

[11] 47 U.S.C. §§ 151, 154(i) & (j), 201-205, and 303(r).

[12] *BOC ONA Order*, at 143-145; *BOC ONA Reconsideration Order*, at 3088-90.

[13] 47 U.S.C. §§ 152(a), 153(a), 153(b) (emphasis supplied).

[14] *BOC ONA Reconsideration Order*, at 3088, para. 38.

[15] Id. at 3088-89, para. 39, quoting from 47 U.S.C. § 203.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Sherry N. Rullman File No. 12860-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on the F-group
channels at Chattanooga, Tennessee

ORDER ON RECONSIDERATION

Adopted: January 11, 1993; Released: January 19, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Sherry N. Rullman (Rullman) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of her application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Chattanooga, Tennessee, and requested reinstatement of her application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated qualification review of this application, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Rullman was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of her application would serve the public interest. Rullman was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] Rullman was also advised in the deficiency letter that failure to file the requested information within thirty days could result in the dismissal of her application.

3. Rullman provided some, but not all, of the requested information. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the Rules, the Division dismissed Rullman's application for failure to comply completely in a timely manner with the Division's request for information. While admitting that all of the requested information had not been submitted, Rullman, on reconsideration, argues: (1) that she lost availability of her proposed transmitter site, and could not prepare an ITFS interference analysis until she signed a lease or lease option agreement for a new site; and (2) she has not entered into a channel capacity lease agreement whereby the lessee agrees to construct the station and supply programming for it.

4. *Discussion.* As of the date of the Division's dismissal action, Rullman still had not submitted all of the information necessary for evaluation of her qualifications to be an MMDS licensee. For example, Rullman had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of her proposed transmitter site as required by Section 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. In addition, Rullman failed to comply with the request to submit a Section 21.902(i) ITFS interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Rullman failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

6. Rullman had a duty to submit curative amendments to her application within thirty days of the Division's written request, or to obtain an extension of time. *Vision-Aire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Her failure to submit curative amendments for more than six (6) months substantially impeded the expeditious offering of MMDS at Chattanooga. Also, Rullman's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Rullman had not provided the required ITFS interference analysis and the required lease or lease option agreement. The Division was not in a position, therefore, to complete evaluation of Rullman's MMDS station pro-

[1] The deficiencies cited in the letter were the absence of: (1) a financial certification, pursuant to 47 C.F.R. Sec. 21.17; (2) a programmer non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (3) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i); and (4) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a).

[2] Even if Rullman was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to Sec. 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

posal and her qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

7. *Conclusion and Ordering Clause.* Having carefully considered the arguments and evidence presented, we find that the dismissal of this application for failure to comply with the Division's request for information was proper, reconsideration of the action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Sherry N. Rullman regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-360

In the Matter of

Regulation of International Common Carrier Services — RM-7578

ERRATA

Released: January 19, 1993

By the Deputy Chief, Common Carrier Bureau:

1. On November 6, 1992, the Commission released its *Report and Order*, FCC 92-463, 57 Fed. Reg. 57,964, 7 FCC Rcd 7331 (1992) in the above-captioned proceeding. The instant Errata corrects Appendix B to conform the rule changes specified therein to the format requirements of the Federal Register. Thus, Appendix B is corrected as set forth below:

- Paragraphs (r)(7)(i)(AA) and (BB) of Section 63.01 are renumbered (r)(7)(i)(A) and (B), respectively.

- Section 63.10(a) is modified to add, as the last sentence of that paragraph, the provision in that section that is designated as paragraph (a)(3)(i). Accordingly, paragraph (a)(3)(i) is deleted and a final sentence is added to Section 63.10(a) that reads as follows: "For purposes of paragraph (a)(1)-(3) of this section, 'affiliation' and 'foreign carrier' are defined as set forth in Section 63.01(r)(1)(i) & (ii), respectively."

- In the last sentence of paragraph (a)(3) of Section 63.11, the phrase "of this section" is inserted after the phrase "certification provided under paragraph (a)(2)(iii). . . ."

- The provision that is designated Section 63.14(a) shall be designated Section 63.14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-426

In re Application of

ELLWOOD BEACH BROADCASTING, LTD. File No. BPH-851231MS

For Construction Permit for a
New FM Station on Channel 225A
(92.9 MHz) in Montecito, Calif.

and

Notice of Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1993; Released: January 19, 1993

By the Commission:

1. By *Order* released June 3, 1992 (Forfeiture Notice), the Commission proposed a $25,000 forfeiture against Ellwood Beach Broadcasting, Ltd. (Ellwood) for failure to timely report the loss of its transmitter site as required by Section 1.65 of the Commission's rules. 7 FCC Rcd 3441 (1992); 47 C.F.R. § 1.65. The Forfeiture Notice gave Ellwood a 30-day period to pay the forfeiture or, alternatively, to file a response showing either that (1) no forfeiture should be imposed or (2) any forfeiture imposed should be in a lesser amount.[1]

2. Ellwood does not dispute that it failed to notify the Commission of the loss of its transmitter site. However, it opposes the proposed forfeiture arguing, *inter alia*, that its failure to notify the Commission was not willful and was without intent to deceive. Having reviewed the record before us, we find that Ellwood's failure to report required information was a willful violation of Rule 1.65. On this basis, we hereby assess against Ellwood a forfeiture in the amount of $7,500. We have determined, however, that there is insufficient basis to conclude that Ellwood acted with intent to deceive the Commission. Accordingly, we have imposed no additional forfeiture against Ellwood for misrepresentation/lack of candor.

Facts

3. Ellwood filed its application for a construction permit to build a new FM broadcast station in Montecito, California on December 31, 1985. In that application, Ellwood proposed to use the existing broadcast tower of standard radio station KIST.

4. Sometime between late Fall of 1990 and mid- to late-February 1992, Ellwood principal and general partner Cherie Welty learned that the KIST tower had been dismantled and was, therefore, no longer available for Ellwood's use.[2] Neither Ellwood nor its then-FCC counsel notified the Commission of this development, however.

5. On February 18, 1992 a competing applicant in the proceeding filed a motion to enlarge against Ellwood based on the loss of Ellwood's transmitter site. In response, Ellwood acknowledged that it "appeared" that its original transmitter site was no longer available. It later amended its application to specify a new transmitter site, and ultimately dismissed its application pursuant to a settlement agreement with another applicant in the proceeding.

Conclusions

6. *Violation of Rule 1.65:* Rule 1.65 requires applicants to promptly notify the Commission "whenever the information furnished in...pending application[s] is no longer... accurate." 47 C.F.R. §1.65. By its own admission, Ellwood, through Welty, had knowledge that its proposed transmitter site had become unavailable.[3] Ellwood's failure to promptly notify the Commission constitutes a violation of Rule 1.65, irrespective of the underlying reasons therefor.

7. *Willfulness of Violation:* Ellwood asserts that its failure to report required information to the Commission was not willful because it resulted from an error and/or misunderstanding and was without intent to deceive. Consequently, it argues, the Commission cannot impose a forfeiture based upon Ellwood's violation of Rule 1.65. We disagree. Ellwood misconstrues the definition of "willful" as used in §503(b) of the Communications Act.[4] "'Willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law." *See* H.R. Rep. No.97-765, 97th Cong. 2d Sess. 51 (1982); *Southern California Broadcasting Company*, 6 FCC Rcd 4387 at ¶ 5 (1991); *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 514 n.22 (1988); *Hale Broadcasting Corp.*, 79

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[1] Now before the Commission are (a) Opposition to Forfeiture Notice (Opposition), filed July 6, 1992 by Ellwood; (b) Declaration of Lewis I. Cohen in Response to Opposition to Forfeiture Notice (Declaration), filed July 23, 1992 by Lewis I. Cohen; (c) Supplement to Opposition to Forfeiture Notice (Supplement), filed July 22, 1992 by Ellwood; and (d) Response to Declaration of Lewis I. Cohen (Response to Declaration), filed August 10, 1992 and supplemented September 3, 1992 by Ellwood.

Lewis I. Cohen, Esq. no longer serves as communications counsel to Ellwood and is not one of its principals. Thus, his authority to directly participate in this matter is unclear. In any event, information provided in the Declaration and in the Response to Declaration is immaterial to the §1.65 issue addressed herein, and, thus, has not been considered.

[2] *See* Declaration of Cherie Welty (appended to the Supplement) at ¶ 4, stating that "[b]y the late Fall of 1990, [I] learned that the KIST tower would probably be dismantled soon." *See also* Opposition at note 3, stating that Welty had learned of the actual dismantling of the KIST tower sometime prior to February 18, 1992.

[3] *See* note 2, *supra*.

[4] Section 503(b)(1)(B) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(1)(B), provides that a forfeiture can be imposed against any party who "willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission...." *See also* 47 C.F.R §1.80(a)(2).

FCC 2d 169, 171 (1980). Put simply, Ellwood knew that it had lost its transmittersite, but failed to promptly notify the Commission as required by Rule. 1.65. This alone provides the degree of "willfulness" required for imposing a forfeiture for violating this important Commission rule.

8. *Forfeiture Amount:* Ellwood further argues that the $25,000 forfeiture proposed in the Forfeiture Notice[5] is excessive and that, if a forfeiture is to be assessed at all, it should not exceed $7,500. Under the Commission's policies regarding the assessment of forfeitures, the base forfeiture amount for failing to file required information with the Commission would be 30% of the $25,000 statutory maximum for a one day violation, or $7,500. *Standards for Assessing Forfeitures (Forfeiture Policy Statement,* 6 FCC Rcd 4695 (1991), *on recon.,* 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992). In addition, the *Forfeiture Policy Statement* permits upward adjustment of the base forfeiture amount for, among other things, repeated or continuous violations of our requirements. Nevertheless, the record before us does not conclusively establish the relevant dates for a determination of how long the violation continued. Given this fact, we conclude that, in this instance, there should be no upward adjustment of the base forfeiture amount based on the continuing nature of the violation, and consistent with the *Forfeiture Policy Statement,* we will thus reduce the proposed forfeiture to $7,500.

9. Ellwood contends that it is a shell entity with no assets and no income, that it has already sustained a substantial loss in conjunction with the prosecution of its application, and that it cannot afford to pay the $25,000 forfeiture proposed in the Forfeiture Notice. On this basis, it claims it is entitled to a downward adjustment of the forfeiture amount. We disagree for the following reasons. First, and as discussed above, we have already reduced the proposed forfeiture to $7,500. Second, we have previously stated that "application of a downward adjustment for inability to pay is based upon a showing of substantial financial hardship." *Forfeiture Policy Statement,* 6 FCC Rcd at 4700 note 6. Ellwood's showing here falls short of the particularized showing required. Indeed, Ellwood did not provide any financial documents supporting its request or any other evidence demonstrating its inability to pay the forfeiture. *Cf. PJB Communications of Virginia, Inc.,* 7 FCC Rcd 2088, 2089 ¶ 8 (1992). Given Ellwood's failure to document its financial situation, coupled with our reduction of the proposed forfeiture amount, we find that Ellwood has not established an inability to pay the reduced forfeiture we now assess.

10. ACCORDINGLY, IT IS ORDERED, That the Opposition to Forfeiture Notice filed July 6, 1992 and supplemented July 22, 1992 by Ellwood Broadcasting, Inc. IS GRANTED to the extent indicated herein and in all other respects IS DENIED.

11. IT IS FURTHER ORDERED That this Memorandum Opinion and Order shall constitute an Order of Forfeiture in the amount of $7,500.

Such payment SHALL BE SENT TO THE FOLLOWING ADDRESS:

FEDERAL COMMUNICATIONS COMMISSION
POST OFFICE BOX 73482
CHICAGO, ILLINOIS 60673-7482

This payment should identify the payor and reference the control number of the Notice of Forfeiture (NOF). In this instance the control number of the NOF is 92-228. This reference SHALL BE PLACED directly on the check. A separate piece of paper is not required.

12. IT IS FURTHER ORDERED THAT the Secretary of the Commission SHALL SEND a copy of this Memorandum Opinion and Order by *Certified Mail -- Return Receipt Requested* to:

Dana M. Hall
19966 Tracey Court
Canyon Country, California 91351

with a copy to:

Lewis J. Paper, Esq.
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[5] The $25,000 forfeiture amount was originally specified in Judge Miller's *Memorandum Opinion and Order,* released March 18, 1992. FCC 92M-343 at ¶ 7 (1992), which also designated additional issues. In the future, the preferable procedure under circumstances where a forfeiture notice is issued in connection with addition of issues in hearing cases would be to give notice of a forfeiture for an amount of up to the statutory maximum, which is $250,000 for broadcasters in the case of continuing violations ($25,000 for a one-day violation). This would mirror the Commission's typical practice in Hearing Designation Orders. *See, e.g., David R. Price,* 6 FCC Rcd 2585, 2586 ¶13 (1991). Thus, future NALs issued to broadcasters, applicants and permittees should specify a potential liability not to exceed $250,000 (the limit on forfeitures for continuing violations involving a single act or failure to act). This approach will avoid unnecessary restrictions on the Commission's ability to assess forfeitures appropriate to the circumstances of each individual hearing case.

Before the
Federal Communications Commission
Washington, D.C. 20554

NEW YORK CELLULAR GEOGRAPHIC SERVICE AREA, INC. File No. 07528-CL-MP-92

For facilities in the
Domestic Public Cellular
Radio Telecommunications
Service on Frequency Block B
in Market no. 6
Boston, Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1993; Released: January 12, 1993

By the Chief, Mobile Services Division:

1. On July 15, 1992, New York Cellular Geographic Service Area, Inc. (New York, CGSA) filed the captioned wireline cellular application to add a new cell to its system in the Boston, Massachusetts (Boston) New England County Metropolitan Area (NECMA). *See Public Notice*, Rep. No. CL-92-128 (released August 18, 1992). The Committee for Effective Cellular Rules (Committee) filed petitions to deny the captioned application, among others. The Mobile Services Division (MSD) dismissed the New York CGSA application and denied the Committee petitions. *See Western Maine Cellular, Inc.*, DA 92-1706 (released December 23, 1992) (*Western Maine*). For the reasons discussed below, we set aside the dismissal of the New York CGSA application, as set forth in *Western Maine*, DA 92-1706 at para. 10. In this order we also grant the New York CGSA application herein.

2. The *Western Maine* order dismissed the captioned application based on an erroneous finding that the contour extension it proposed illegally covered an unserved area.[1] *Western Maine* at n.5. An unserved area is defined as any area "where there is no [Cellular Geographic Service Area] CGSA." *Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, First Report and Order and Memorandum Opinion on Reconsideration, (First Report and Order)* 6 FCC Rcd 6185, 6200 (1991) (footnote omitted). Saco River Cellular Telephone Company (Saco River) is the licensee in the Portsmouth-Dover-Rochester, New Hampshire (Portsmouth) NECMA where New York CGSA proposed its contour extension. Prior to the expiration of the 5 year fill-in period in the Portsmouth NECMA, Saco River had made its CGSA coterminous with the NECMA boundaries. *See GTE Mobilnet of Terre Haute Limited Partnership*, DA 92-1484 (Mobile Serv. Div. 1992). Accordingly, the area where New York CGSA proposed an extension was not unserved. Furthermore, Saco River had agreed to the New York CGSA contour extension into the Portsmouth NECMA. *See* Letter From J. David Medcalf, Systems Engineer, Star Cellular, to John Williamson, NYNEX Mobile Communications (July 8, 1992); New York CGSA Application, Attachment 1. Because there was no unserved area in the Portsmouth NECMA, and Saco River agreed to the instant extension, the New York CGSA application did not run afoul of the unserved area rules. Therefore, pursuant to Section 1.113 of the Commission's Rules[2] we set aside the action taken in *Western Maine* dismissing the captioned New York CGSA application. Based on the above, we hereby grant the application.

3. For the reasons discussed above, we conclude that New York CGSA is legally, technically, and otherwise qualified to construct and operate the proposed facilities, and we further find that a grant of its application will be in the public interest and will promote the efficient provision of service to the public.

4. Accordingly, IT IS ORDERED THAT the dismissal of the application of New York Cellular Geographic Service Area, Inc. (File No. 07528-CL-MP-92) is SET ASIDE.

5. IT IS ALSO ORDERED THAT the application of New York Cellular Geographic Service Area, Inc. (File No. 07528-CL-MP-92) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko,
Chief, Mobile Services Division
Common Carrier Bureau

[1] *Western Maine* also held that the dismissal of the New York CGSA action was taken "quite apart from Committee's arguments" in its petition. *Id.* at n.5. That being so, the denial of Committee's petitions to deny in *Western Maine* is *res judicata*, and is in no way affected by the actions taken in this order.

[2] Section 1.113 provides, in pertinent part, that:

Within 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel or board taking the action may modify or set it aside on its own motion.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: January 7, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

State University of New York 8310-MD92060647
Licensee, WSUC-FM, Cortland, NY
Graham Avenue, Brockway Hall
Cortland, NY 13045

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended.

The Commission has received information indicating that Radio Station WSUC-FM, Cortland, NY, may have broadcast indecent language in violation of 18 U.S.C. § 1464. Specifically, it was alleged WSUC-FM's broadcast of certain rap music on June 21, 1992, contained vulgar language. The attached transcript was made from the complainant's tape of the broadcast.

Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

It appears that the subject broadcast describes sexual activities and organs in patently offensive terms and is therefore indecent. Because it aired at mid-afternoon, when there was a reasonable risk that children may have been in the audience, it is legally actionable. Thus, it appears that on June 21, 1992, Station WSUC-FM violated 18 U.S.C. § 1464 by airing indecent programming. Accordingly, pursuant to Section 503(b) of the Communications Act, State University of New York is hereby advised of its apparent liability for a forfeiture of twenty-three thousand seven hundred fifty dollars ($23,750) for its apparent willful violation of 18 U.S.C. § 1464 on June 21, 1992. The amount specified was determined by using the criteria set forth in the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom., USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), and the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended. The base amount for an indecency violation is $12,500. We believe the egregious nature of the material exacerbates the violation. Thus, we are adjusting the forfeiture amount accordingly. *See Policy Statement, supra*, at 4700.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 U.S.C. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on January 5, 1993.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

Radio Station WSUC-FM, Cortland, NY
Date/Time Broadcast: June 21, 1992 at mid-afternoon
Material broadcast: Rap music

Recorded music:

Unusual, kinda casual, yes, with me girls are obsessed, to get undressed, get fresh and have me yodel in the valley, and I do it at the drop of a dime, dime, sometimes go in from behind, (Unintelligible) no joking, my tongue just keeps on poking, and the best type of oochie coochie, is the type that tastes like sushi, eat it, watch your girl get frisky and then wash it down with a shot of whiskey. (Unintelligible) In the valley. (Unintelligible) I remember when I spent the night at Sally's house, woke up with cotton mouth. Couldn't speak, my tongue was weak, from yodelling in the valley. Oh, I love them mountain sides(?) and a piece of pie before my eyes, but before I taste them juices, I make sure that Sally douches. But she's not the only one, I like to yodel on, it sounds wicky wacky, ticky tacky, but you know that I'm most happy, yodelling in the valley. Yodelling in the valley. A delicious break from potatoes. Check it out. I need some more yodelling music. A delicious break from potatoes, a delicious break from potatoes. Check it out. I need some more. (Unintelligible). A delicious break from potatoes. A delicious break from potatoes. (Unintelligible) Yodelling in the valley. Can't figure it out. Girls think I'm a freak, 'cause I don't speak, whisper in their ear, and make it clear I love 'em. Sorry dear. Don't. (Unintelligible) 'Cause how can I to say I love you when you're sitting upon my face. Oh yes, it's more than (Unintelligible) in

the valley. You (Unintelligible) Had a bush bigger than the Amazon, forest that felt like a taurus(?) (Unintelligible) like a back, back. Oh shit, where's my weed-wacker? Came out with hair on my tongue. But still I got the job done. In the valley. (Unintelligible). Sally. I like that (Unintelligible) burger. (Unintelligible). Yodelling in the valley. Yodelling in the valley. (Unintelligible) A delicious break from potatoes. Yodelling. Yodelling. (Unintelligible). Now I talked to this girl for about two weeks, and I've been many places and seen many freaks but this girl was just (Unintelligible) nobody could lick it and the bitch was just flappin' as she was like buggin'(?) I got to know her but this is the time she gave some things of hers for some things of mine. Everything was going good, could nothing go better, Anything she wanted to do I would just let her. Wasn't like them other niggers trying to screw her up, I would rush her to the mall, and (Unintelligible) her up. Have a drink when she was by my side, I want the bitch to look good when she's rolling in my ride. Two weeks later I noticed a change, something wasn't right, she was acting kinda strange. Took some money out of my stash, stuffed it in her purse, you think you could get (Unintelligible). Shit it's gonna get worse. Well, look like I got myself a few problems, (Unintelligible) being I'll see 'ya (Unintelligible) I'll solve 'em. She ran out the house, and drove down the street, stopped the bus and (Unintelligible) I couldn't believe what I was told, he gave the bitch double up for a (Unintelligible) piece of gold. So I picked up on the bitch and said, (Unintelligible)' "'Ho" I caught 'ya, and by the way where's the link I bought 'ya?" Now this girl must have lost her mind, scraping up the dough with the things of mine, I want to beat her(?) Better yet, stomp her, break out the 12-guage and (Unintelligible) full of buck shot, pump her. (Unintelligible) Well, I said (Unintelligible) Fuck it, I'm a chill, this girl needs help, she's mentally ill. She's got the tricks, she's got to spending my (Unintelligible) so much I just had to rip the pipe out her lips. She cried, oh please give me some money, I promise I'll stop, please. (Unintelligible) I felt sorry for the girl 'cause she's being misused, it was the crack and the devil(?) applied to abuse. This relationship just ain't going to last, girl I'm have to get rid of your ass, 'cause you're my dick, dick ding-a-ling, (Unintelligible) trying to tie my arms and legs with a string, my money, I know you love me, but let me tell you one thing, (Unintelligible) I'm not your puppet, (Unintelligible) So listen up to what we say, because (Unintelligible) Bitch. Bitch. You want to suck what? (Unintelligible) I wouldn't touch that. (Unintelligible) And with your wrinkled pussy, I can't be a lover. Hopped out of bed about three o'clock, stumbled to the door when I heard the knock. I thought, man, now who in the fuck could this be? When I got to her, she said, (Unintelligible) it's me. I thought "Ywe was supposed to go out this week. I said not tonight girl, I'm Nabout to go back to sleep. (Unintelligible). Being a big booty, helluva freak, before I closed the door she blocked the shit(?) with her feet. Pushed her way in, didn't use much force, she said, I know we're going out. I say, yeah, of course. I'm saying that this bitch (Unintelligible). 'Cause why the fuck close the door this time of the night. But the only thing that was on my mind, was just shoving my dick up this bitch's behind. She thought that I forgot, that she was the one that was smoking rocks. I looked at the girl and said, babe, do you know what Mark said? Your ass ain't nothing but a base hit. She disagreed, she says, stop lying, so she broke out crying. I said, baby, you got to help yourself, don't expect help from anyone else, this relationship just ain't going to last, girl I'm going to have to get rid of your ass, yeah, 'cause you're on my dick, dick, ding-a-ling. Trying to tie my arms and legs with a string. My money (Unintelligible) I know you love it, but let me tell you one thing, I'm not, I'm not your puppet. Days later, the bitch, oh, you got to give me some now, bitch, (Unintelligible) the girl was dumb, she was straight out sprung, that dope was a rope and her soul was hung. But one day I went to see my D J, the grand, incredible, wizard Tony A. Got to his house then I knocked on the door, the nigger didn't answer so I banged once more, I wondered where the fuck he was at, so I jumped off the porch then I fell to the back. He was there 'cause I heard the system pumping, went up to the window, and heard the bed romping, I grabbed a crate just to peek through the window, the trick (Unintelligible) was getting played like Nintendo(?) Jumped in the window, when I said, what's up? Tony had a her bent over (unintelligible) he was working her butt. She seen my face, she started to scream, I said, shut up bitch, you're getting double teamed. Popped my dick in her mouth, and we rocked it back and forth, from the east to the west, the south and the north, I got tired and said, man, I'm' quitting. Tony A said, (Unintelligible) pay this bitch, grabbed a rock and she started to flip, the 'ho wanted to smoke, man this girl was a trip. She said 'yo' check this out man, my dope smokes in a pipe and it melts in my hand. Now that she sucked my dick and (unintelligible) Tony fuck you in the ass. I know this relationship just ain't going to last, 'cause yeah, you're on my dick, dick, ding-a- ling, trying to tie my arms and legs with a string, I know you love me, well let me tell you one thing, I'm not, I'm not your puppet. (Unintelligible) Well I pulled out my dick, popped it in her mouth, and she sucked it, picked up her dress, and seen this bloody mess, so I said fuck it, fuck it, fuck it. Now the story that I told won't make you rich but, (Unintelligible).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-629

In the Matter of

Amendment of Section 73.202(b), RM-7031
Table of Allotments,
FM Broadcast Stations.
(LaFayette, Georgia)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 24, 1992; Released: January 21, 1993

By the Chief, Policy and Rules Division:

1. Before the Commission is a petition for reconsideration of the *Report and Order* in this proceeding, 6 FCC Rcd 7427 (1991), filed by B. Edward Tuten ("Tuten").[1] [2] The *Report and Order* granted a petition for rule making filed by Radix Broadcasting, Inc. ("Radix"), which proposed an allotment of Channel 298A to LaFayette, Georgia. The *Report and Order* also dismissed counterproposals filed by Tuten, Wildwood Broadcasters, Inc. ("Wildwood") and Virginia Ann Sattler ("Sattler"). Radix filed an opposition to Tuten's petition for reconsideration.

2. *Background.* This proceeding originated with a petition for rule making filed by Radix requesting the allotment of Channel 298A to LaFayette, Georgia, as that community's first local FM service. In response to the *Notice of Proposed Rule Making*, 5 FCC Rcd 571 (1990), Tuten, Wildwood and Sattler filed mutually exclusive counterproposals. Tuten requested the allotment of Channel 298A to Tunnel Hill, Georgia, as that community's first local transmission service. Wildwood requested an allotment of Channel 298A to Wildwood, Georgia, as that community's first local transmission service. Sattler, permittee of Station WJRX(FM), Channel 300A, East Ridge, Tennessee, requested the substitution of Channel 300C3 for Channel 300A and modification of her station authorization accordingly.

3. The *Report and Order* granted the Radix petition and allotted Channel 298A to LaFayette, Georgia, as that community's first local FM service. The *Report and Order* dismissed the counterproposals as unacceptable for rule making for failure to comply with the minimum mileage separation requirements of Section 73.207 of the Commission's rules. The *Report and Order* noted that the counterproposals were filed after October 2, 1989, and therefore must comport with the mileage separation requirements adopted in MM Docket No. 88-375, *Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations*, 4 FCC Rcd 6375 (1989) ("*Mileage Separation Order*").

4. *Petition for Reconsideration.* Tuten argues that the Commission applied different rules to the Radix petition and the counterproposals, thereby denying Tuten his due process rights. Tuten states that because the Radix proposal was filed prior to October 2, 1989,[3] it received the benefit of the generally less restrictive minimum mileage separation rules in effect prior to that date. Tuten's counterproposal was filed after October 2, 1989, and therefore was judged pursuant to the minimum mileage separation rules in effect on the date of its filing. Tuten contends that because the Radix proposal was put on public notice after October 2, 1989, he did not have notice of the proposal before the new minimum mileage separation rules went into effect. Citing *Green Country Mobilephone v. FCC*, 765 F.2d 235 (D.C. Cir. 1985), Tuten argues that his counterproposal should be treated under the same rules as the Radix proposal, to which he was responding. Tuten further relies on *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990), for the proposition that administrative fairness dictates that all proposals within a proceeding be treated identically. Tuten claims that his proposal was superior to the Radix proposal and that if it had been considered under the same minimum mileage separation rules, his proposal would have prevailed pursuant to the FM allotment priorities.[4] Tuten states that the decision to treat the proposals differently was erroneous and therefore the *Report and Order* should be overturned and Tuten's counterpropsal should be adopted as superior pursuant to the Commission's FM allotment priorities.

5. Radix's opposition to the petition for reconsideration points out that Tuten does not claim that he had no notice of the change in rules pursuant to the *Mileage Separation Order*, nor does Tuten claim that the Commission lacked the authority to implement the change in the minimum mileage separation rules. The opposition contends that Tuten had notice of the change in the minimum mileage separation rules and could have filed his petition prior to the effective date of the Mileage Separation Order, but Tuten failed to do so. Radix claims, "Tuten does not suggest that there were any barriers to his filing his proposal prior either to the new requirements coming into effect or to the *Notice of Proposed Rule Making* issued pursuant to the Radix Petition. Thus, any notice, or lack thereof, regarding the Radix proposal is totally irrelevant to Tuten's opportunity to file his proposal."[5]

6. *Discussion.* We will deny Tuten's petition for reconsideration. While different minimum mileage separation rules were applied to the Radix proposal and to the three counterproposals, including the counterproposal submitted

[1] Public notice of the filing of Tuten's petition was given on February 18, 1992, Report No. 1878.

[2] Tuten simultaneously filed a Motion for Stay of the application filing window at LaFayette. That motion is now moot, given the resolution of this proceeding.

[3] Radix's petition for rule making was filed on September 7, 1989.

[4] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). The FM priorities are 1) first full-time aural service; 2) second full-time aural service; 3) first local service; and 4) other public interest matters. Co-equal weight is given to priorities 2 and 3.

[5] Radix opposition at page 2.

by Tuten, that action was not in error and did not in any way deny any party its due process rights. Administrative fairness does not require a reversal of the *Report and Order* in this proceeding.

7. Tuten's argument rests on the fact that although the Radix proposal was filed prior to a change in the minimum mileage separation rules which became effective October 2, 1989, the proposal was not released on public notice until after that date, thereby preventing Tuten from filing a counterproposal prior to the October 2, 1989 change. Tuten seeks the benefit of the minimum mileage separation rules previously in effect even though he failed to file his proposal while those rules were in effect.[6] We agree with Radix that notice of the Radix proposal after the effective date of the new minimum mileage separation rules is irrelevant, as Tuten has not claimed that his proposal could not have been submitted on its own merit, irrespective of Radix's proposal. Nor does Tuten explain why, if he desired the proposal to be analyzed under the previous minimum mileage separation rules, he did not file his proposal prior to the effective date of the new rules. Additionally, Tuten was placed on notice by the *Mileage Separation Order* that the mileage separation rules would change as of October 2, 1989. The *Mileage Separation Order* specifically stated that all proposals received after the effective date of October 2, 1989, would be considered under the new rules adopted in that proceeding. No distinction was made between petitions for rule making and counterproposals to a rule making proceeding.[7] The Commission has acted consistently with respect to the effective date of the change in the minimum mileage separation rules in that proposals are examined pursuant to the rules in effect on the date the proposal was filed with the Commission.[8]

8. IT IS THEREFORE ORDERED, That the Petition for Reconsideration filed by B. Edward Tuten IS DENIED.

9. IT IS FURTHER ORDERED, That the Motion for Stay filed by B. Edward Tuten IS DISMISSED as moot.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[6] Tuten's reliance on *Green Country Mobile Phone* is misplaced. That case held that similarly situated parties must be treated in the same manner. That proceeding concerned the acceptance of filings at the Commission and whether the Commission had acted consistently in allowing some parties to file after the close of a filing period. In contrast, all of the similarly situated counterproposals in this proceeding were treated in the same manner. The Radix proposal was filed prior to the rule change and is therefore dissimilar to Tuten's counterproposal, which was filed after the change in rules. Tuten does not claim that he did not have notice of the proposed change in rules or notice of the effective date of such change. All proposals received prior to October 2, 1989 were treated under the rules in effect at the time they were filed. All proposals received after October 2, 1989 are treated under the current rules. Similarly, Tuten's use of *Northeast Cellular Telephone Company* is misplaced. That case remanded to the Commission an order granting a waiver because the order failed to articulate any standard by which the court could determine whether circumstances existed which justified the grant of a waiver and the policy relied upon in granting the waiver, both of which are requirements of *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Tuten never requested a waiver of any rules and the Commission did not, in fact, waive any rules for the parties in this proceeding.

[7] 4 FCC Rcd at 6382.

[8] *See, e.g. Lancaster, Wisconsin, Clinton and Manchester Iowa, and Morrison Illinois*, 6 FCC Rcd 6113 (1991), *Stuart and Boone, Iowa*, 5 FCC Rcd 5437 (1990), *recon. denied*, 6 FCC Rcd 6036 (1991), *Hardinsburg, Kentucky*, 5 FCC Rcd 7684 (1990), *recon. denied*, 7 FCC Rcd 1746 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-47

In the Matter of

Amendment of Section 73.606(b), RM-7929
Table of Allotments,
TV Broadcast Stations.
(Bellingham and Anacortes, Washington)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 24, 1992; Released: January 21, 1993

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration of the *Report and Order* in this proceeding, 7 FCC Rcd 5453 (1992), filed by Darlene C. Paglinawan McHenry ("McHenry"), permitee of Low Power Television Station K24CX, Channel 24, Anacortes, Washington.[1] The *Report and Order* granted a petition for rule making filed by Prism Broadcasting Company, Inc. ("Prism"), permitee of Station KBCB(TV), Channel 64, Bellingham, Washington, requesting the reallotment of UHF television Channel 24 in lieu of Channel 64 at Bellingham, and the reallotment of Channel 64 in lieu of Channel 24 at Anacortes. Prism filed an untimely opposition in response to McHenry's petition for reconsideration.[2]

2. *Background.* The *Report and Order* approved the substitution of Channel 24 in lieu of Channel 64 at Bellingham so as to allow Prism to operate Station KBCB(TV), Bellingham, at "the site specified in its construction permit, at increased power without having to negotiate special limits by international treaty with Canada.[3] We determined that this action served the public interest by allowing for increased and improved service to the population within Station KBCB(TV)'s coverage area. The *Report and Order* also rejected McHenry's objection that this action would prevent it from eventually modifying its construction permit for Station K24CX to operate at increased power. In rejecting this claim, we reiterated our policy that low power television is a secondary service, and that changes to the Television Table of Allotments may be made without regard to LPTV stations.

3. *Petition for Reconsideration.* McHenry argues that we wrongly accepted, without requiring factual support, Prism's claim that the Canadian government is unlikely to approve operation of Station KBCB(TV) on Channel 64 at Bellingham at more than 1,000kW ERP. McHenry asserts that the substitution is unnecessary, as Prism could operate its Channel 64 at Bellingham at full power from alternate sites in the area. McHenry argues that operation of Station KBCB(TV) on Channel 24 in lieu of Channel 64 would not significantly increase the population served by the station, as it is located in a sparsely populated area of Washington. Finally, McHenry argues that she has expended considerable effort and is ready to commence low power television service on Channel 24 at Anacortes, whereas Prism received its construction permit for Channel 64 at Bellingham several years ago and has yet to construct its station. McHenry maintains that public interest concerns dictate that she be permitted to operate on Channel 24 at Anacortes despite her station's secondary status.

4. *Discussion.* We will deny McHenry's petition for reconsideration. As an initial matter, we reject McHenry's argument that Prism's delay in constructing exhibits a lack of commitment by Prism to operate Station KBCB(TV). At all relevant times, Prism has sufficiently maintained its interest in Channel 64 with valid and timely requests for extensions of time in which to construct a station.[4]

5. We continue to believe that substitution of Channel 24 in lieu of Channel 64 at Bellingham serves the public interest. This action will permit Prism to operate Station KBCB(TV) at more than 1,000kW ERP at its presently authorized site without the need to conduct negotiations with Canada to establish special frequency limits. The resulting increase in power will bring an increase in the population capable of receiving service by Station KBCB(TV).

6. As we stated in the *Report and Order*, low power television facilities are classified as secondary services. As such, full power television stations take precedence over LPTV facilities.[5] We do not believe that Prism should be required to find a site other than that specified in its construction permit, or be required to operate at limited power, when the use of an alternate channel would permit higher powered operation and the only impediment to such use is the presence of a low power television station.

7. Therefore, IT IS ORDERED, That the Petition for Reconsideration filed by Darlene C. Paglinawan McHenry, permitee of LPTV Station K24CX, Anacortes, Washington IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Lawrence A. Walke, Mass Media Bureau, (202) 634-6530.

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[1] Public notice of the filing of McHenry's petition was given on October 13, 1992, Report No. 1911.

[2] Prism filed its opposition on November 20, 1992, twenty-three days after the filing deadline. Prism offers no explanation for its untimely filing. Therefore, we will not consider Prism's comments. *See* 47 C.F.R. §1.429(f).

[3] Channel 64 at Bellingham is short-spaced to Channel 63, Vancouver, British Columbia. Prism claimed in its petition for rule making that special limits negotiated by international treaty with Canada are required to operate Channel 64 at more than 1,000kW effective radiated power ("ERP"). However, operation at increased power on Channel 24, if realloted to Bellingham, would not require special negotiations with Canadian authorities.

[4] The Commission issued Prism's construction permit for operation on Channel 64 in April 1989. In April 1991, Prism received a time extension because of a delay in the delivery of the antenna system. Subsequently, Prism received two more extensions due to this pending rule making proceeding. *See* File Nos. BPMCT-890314KE, BPMCT-910419KE, and BPMCT-920519KE.

[5] *See* 47 C.F.R. §74.702(b).

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-230

In the Matter of

Amendment of Section 73.202(b), RM-8090
Table of Allotments,
FM Broadcast Stations.
(Snow Hill, Maryland)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 30, 1992; Released: January 21, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 6803 (1992), issued in response to a petition for rule making filed by Snow Hill Community Broadcasting requesting the allotment of Channel 223A to Snow Hill, Maryland, as the community's first local transmission service. No comments were received from petitioner or any other party.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. In the absence of such an expression of interest, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition for rule making filed by Snow Hill Community Broadcasting requesting the allotment of Channel 223A to Snow Hill, Maryland, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-166

PUBLIC NOTICE

Released: January 8, 1993

MSS ABove 1 GHz Negotiated Rulemaking Committee

Agency: Federal Communications Commission

Action: Notice of public meetings.

Summary: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice advises interested persons of the second meeting of the MSS Above 1 GHz Negotiated Rulemaking Committee ("Committee"), which will be held at the Federal Communications Commission in Washington, D.C.

Date: Thursday, January 28, 1993 at 9:30 a.m.

Address: Federal Communications Commission, Rm. 856, 1919 M Street, N.W., Washington, D.C. 20554.

For additional information contact: Kathleen Campbell, Administrative Assistant to the Committee, at (202) 634-1952.

Supplementary Information: The agenda for the second meeting of the MSS Above 1 GHz Negotiated Rulemaking Committee is as follows:

1. Opening Remarks/Comments
2. Adoption of Agenda
3. Minutes/Records of Previous Meeting
4. Introduction of Documents
5. Informal Working Group Reports
   -Issues
6. Acceptance/Approval of Recommended Rules
7. Acceptance/Approval of Report Text
8. Agenda for future meetings
   -Schedule for future meetings
9. Other Business

Members of the general public may attend this meeting. The Federal Communications Commission will attempt to accommodate as many people as possible. However, admittance will be limited to the seating available. There will be no public oral participation, but the public may submit written comments to Fern J. Jarmulnek, the Committee's Designated Federal Officer, before the meeting.

Subsequent Committee meetings are scheduled for Thursday, February 2; Monday, February 8; Thursday, February 18; Thursday, February 25; Thursday, March 4; Tuesday, March 8; Thursday, March 18; Thursday, March 25; and Friday, April 2. All meetings are scheduled to begin at 9:30 A.M. at the Federal Communications Commission, 1919 M Street, N.W., Room 856, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-315

In the Matter of

Amendment of Section 73.202(b), RM-8141
Table of Allotments,
FM Broadcast Stations.
(Starbuck, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 21, 1992; Released: January 21, 1993

Comment Date: March 15, 1993
Reply Comment Date: March 30, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Starbuck Broadcasters ("petitioner"), seeking the allotment of Channel 247C2 to Starbuck, Minnesota, as that community's first local broadcast service. Petitioner provided an engineering study in support of the petition and indicated it would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment would provide a first local transmission service to Starbuck. Channel 247C2 can be allotted to Starbuck consistent with the Commission's minimum distance separation requirements provided there is a site restriction 6.7 kilometers (4.2 miles) southwest of the community.[1] The site restriction will prevent a short spacing to Station KDKK, Channel 248C1, Park Rapids, Minnesota.

3. In view of the fact that the proposed allotment would provide a first local transmission service to Starbuck, Minnesota, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Starbuck, Minnesota	---	247C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on ore before **March 15, 1993**, and reply comments on or before **March 30, 1993**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Gregg P. Skall
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michanel C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 247C2 at Starbuck are 45-33-44 and 95-34-15.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-212

In the Matter of

Amendment of Section 73.202(b), RM-8064
Table of Allotments,
FM Broadcast Stations.
(Rudolph, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 21, 1992; Released: January 21, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 6234 (1992), issued in response to a petition filed by Wizard Communications, Inc. ("Wizard"), proposing the substitution of Channel 260C3 for Channel 260A at Rudolph, Wisconsin. Wizard also requested modification of its license for Station WIZD, Channel 260A, to specify operation on Channel 260C3.[1] Wizard filed comments in which it reaffirmed its interest in the channel. Kramer Broadcasting, Inc. ("Kramer") filed comments. Wizard filed reply comments.

2. Kramer, licensee of Station WDDC(FM), Channel 261A, Portage, Wisconsin, requests the Commission to reject Wizard's proposed upgrade at Rudolph. Kramer states that its station is currently short spaced to Station WJVL(FM), Channel 260B1, Janesville, Wisconsin, and to Station WEMI(FM), Channel 261A, Neenah-Menasha, Wisconsin. Kramer argues that adoption of Wizard's proposal precludes Station WDDC(FM) from filing an application to increase its power to 6 kilowatts which would expand its reception area and remove the short spacings between itself and Janesville and Neenah-Menasha.[2]

3. In response, Wizard contends that Kramer has offered only unfounded speculation and has not provided the Commission with any facts to justify denial of the upgrade at Rudolph. Further, Wizard notes that Kramer has not filed an application for the power increase and it makes no showing that there are no available sites for a fully-spaced six kilowatt operation. Wizard argues that Kramer has not even identified a desired site for its move. Wizard requests that Kramer's objections be dismissed and its proposal for Rudolph be granted.

4. We believe the public interest would be served by substituting Channel 260C3 for Channel 260A at Rudolph since it would provide expanded reception service to the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[3] In addition, we have authorized a modification of the license for Station WIZD, Rudolph, Wisconsin, to specify operation on Channel 260C3, in accordance with Section 1.420(g) of the Commission's Rules. In response to Kramer's comments, we do not believe the public interest would be served by denying Wizard's proposal to accommodate the possible future modification plans for Station WDDC(FM). It is not Commission policy to deny a new or expanded service to protect another station's future plans. *See Clarendon, Pennsylvania*, 6 FCC Rcd 6053 (1991) and *Independence, California*, 7 FCC Rcd 1738 (1992).

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 8, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Rudolph, Wisconsin	260C3

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WIZD, Rudolph, Wisconsin, IS MODIFIED to specify operation on Channel 260C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Wizard Communications, Inc., licensee of Station WIZD, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

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[1] Wizard was granted a construction permit for Channel 260A as a six kilowatt facility on April 6, 1992, which expires on October 6, 1993 (BPH-911218ID).

[2] We note that Channel 261A at Portage is fully spaced to Station WJVL(FM) and Station WEMI-FM in accordance with the spacing requirements in effect prior to October 2, 1989. *See Second Report and Order in MM Docket 88-375*, 4 FCC Rcd 6375 (1989), *recon.* 6 FCC Rcd 3417 (1991).

[3] The coordinates for Channel 260C3 at Rudolph are 44-21-31 and 89-39-23.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-123

In the Matter of

Amendment of Section 73.202(b),	RM-7992
Table of Allotments,	
FM Broadcast Stations.	
(Mexico, New York)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 21, 1992; Released: January 21, 1993

By the Chief, Allocations Branch:

1. At the request of Renard Communications Corp. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 3796 (1992), proposing the allotment of Channel 280A to Mexico, New York, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 280A to Mexico, New York, as it could provide the community with its first local FM service. Channel 280A can be allotted to Mexico in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] We recognize that this allotment would be short-spaced to Station CHXL-FM, Channel 279B, Brockville, Ontario, and Station CBBP-FM, Channel 280B, Peterboro, Ontario, Canada. However, we have determined that a station can limit its power in the direction of these stations and avoid any prohibited interference. Canadian concurrence in the allotment of Channel 280A to Mexico, as a specially negotiated allotment, has been received since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 8, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Mexico, New York	280A

4. The window period for filing applications will open on **March 9, 1993**, and close on **April 8, 1993**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As requested in the *Notice*, the petitioner also corrected the failure to provide a verification statement in its petition by including such a statement in its comments.

[2] The coordinates for Channel 280A at Mexico are North Latitude 43-27-34 and West Longitude 76-13-45. Petitioner's comments suggest an alternate site 6.4 kilometers (4 miles) east of Mexico, but it failed to include any engineering study showing that the channel can be allotted at the newly proposed coordinates in compliance with the Commission's spacing requirements. Therefore, in light of the Commission's policy to allot channels with the least site restriction possible, we will allot the channel at the coordinates proposed in the *Notice*. *See Vacaville, California*, 4 FCC Rcd 8315 (1989). However, petitioner and any other interested party may file an application specifying any transmitter site which meets the spacing requirements set forth in the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-316

In re Applications of

RIVERTOWN COMMUNICATIONS COMPANY, INC. (hereafter "Rivertown") File No. BPH-911008ME

SAMPLE BROADCASTING COMPANY, L.P. (hereafter "Sample") File No. BPH-911010MA

For Construction Permit
for a New FM Station on Channel 282C3
in Eldon, Iowa

HEARING DESIGNATION ORDER

Adopted: December 30, 1992; Released: January 21, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Prelimary Matter.* On July 7, 1992, Rivertown filed a Petition for Leave To Amend its application. The petition states:

> The instant amendment notes that [principal David W.] Brown is now employed as general manager of Stations WAIK and WGBQ(FM), Galesburg, Illinois, and that, in the event of a grant of Rivertown's application, he will resign this position in order to devote full time to the managemment of Rivertown's Eldon station.

3. On July 10, 1992, Sample filed a "Partial Opposition to Petition for Leave To Amend." In the opposition, Sample maintains that "because [Rivertown] has failed to identify when Mr. Brown commenced his employment with the Galesburg radio stations" the amendment is "incomplete" insofar as it is impossible to gauge whether Rivertown's divestiture pledge is "contemporaneous." Sample concludes that Rivertown should disclose when Brown commenced employment at the Galesburg stations. In a reply filed on July 22, 1992, Rivertown indicated that Brown's Galesburg employment began on May 26, 1992, pursuant to an employment contract dated May 8, 1992. In the event of grant of Rivertown's instant application, that contract permits Brown to terminate his employment upon 30 days notice. On October 1, 1992, Rivertown filed a Petition for Leave To Amend indicating that "Mr. Brown resigned his employment as general manager of Stations WAIK and WGBQ(FM), Galesburg, Illinois, on September 11, 1992." The amendment also reported that on September 14, 1992 Brown recommenced employment as general manager of Station KKMI-FM, Burlington, Iowa and reaffirmed that, in event of grant of Rivertown's application, he would resign that position. In sum, Sample has obtained the disclosure it sought,[2] and we will grant the Rivertown petitions for leave to amend in accordance with paragraph 4, below.

4. *Late-Filed Amendments.* The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Rivertown	5/11, 7/7, 10/1/92
Sample	4/8, 4/29, 7/20, 11/24//92

5. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

[1] On April 14, 1992 Rivertown filed a petition to deny the Sample application. The petition to deny is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 214-215 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.

[2] In the alternative, Sample requested that a reporting issue be specified against Rivertown. This request is misdirected. *See supra* note 1. Moreover, based on our review of the Rivertown application, its amendments, and the various pleadings, we do not find any substantial and material question of fact warranting specification of such an issue.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Rivertown (5/11, 7/7, 10/1/92) and Sample (4/8, 4/29, 7/20, 11/24//92) ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), recon. granted in part, 6 FCC Rcd 3403 (1991).

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-310

In re Applications of

ROBERT M. RICHMOND (hereafter "Richmond") File No. BPH-910703MD

BARBARA BRINDISI (hereafter "Brindisi") File No. BPH-910703MI

LAURYN BROADCASTING CORPORATION (hereafter "Lauryn") File No. BPH-910703MJ

For Construction Permit
for a New FM Station on Channel
265A (100.9 MHz) in Beaumont,
California

and

KAY SADLIER-GILL (hereafter "Sadlier-Gill") File No. BPH-910611IF

For Modification of Facilities
For Station KATY-FM
Idyllwild, California

HEARING DESIGNATION ORDER

Adopted: December 22, 1992; Released: January 21, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications.[1]

2. Sadlier-Gill. Sadlier-Gill proposes to locate her transmitting antenna on a new tower. Our engineering study indicates that Sadlier-Gill failed to address the matter of how she proposes to resolve any RF exposure to workers on her tower. See 47 C.F.R. §1.1307(b). Consequently, we are concerned that she may have failed to comply with the environmental criteria set forth in the Report and Order in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). See also, Public Notice entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicant must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. §1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. §1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. §1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Sadlier-Gill failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, she will be required to submit the environmental impact information described in 47 C.F.R. §1.1311. See generally, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Sadlier-Gill will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. §1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See Golden State Broadcasting Corp., 71 FCC 2d 229 (1979), recon. denied sub nom. Old Pueblo Broadcasting Corp., 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessment, that Sadlier-Gill's proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. See 47 C.F.R. §1.1308(d).

3. Other Matters. Brindisi's proposal reflects the construction of a new tower to be located approximately 30 meters from the directional antenna of FM translator station K201AR, Banning, California (BLFT-861110TB). Additionally, Richmond's and Lauryn's proposals reflect an antenna side-mounted on the existing tower of K201AR. Consequently, the tower proposed by Brindisi and the transmission line proposed by Richmond and Lauryn have the potential to disrupt the translator stations' directional antenna pattern. Accordingly, each of the above-mentioned applicants will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order which demonstrates that their proposals will have no adverse impact on the directional antenna pattern of translator station K201AR.

4. Serna Broadcasting, Inc. ("Serna")[2] has filed petitions to deny against the applications of Richmond and Lauryn and an informal objection against the application of Brindisi. The applicants have requested to have their applica-

[1] On June 11, 1991, during the window filing period for the Beaumont allocation, June 3, 1991 to July 3, 1991, Sadlier-Gill filed the above referenced application for modification of the facilities of KATY-FM, Idyllwild, California. This application is not short-spaced to the Beaumont allocation for Channel 265A; however, it is short-spaced to the applications for Channel 265A. Therefore, Sadlier-Gill's application is mutually exclusive and will be designated for hearing.

[2] Serna filed an application for the Beaumont, California facility which was mutually exclusive with the other applicants in this proceeding. However, the Chief, FM Branch returned Serna's application on June 18, 1992 because the applicant had

tions processed pursuant to 47 C.F.R. §73.213(c) with respect to the existing facilities of KATY-FM. Serna argues that these applications may not be processed under Section 73.213(c) because of the subsequently-filed modification application by Sadlier-Gill to relocate the transmitter site of KATY-FM. Serna believes that, because Sadlier-Gill's modification application is fully-spaced to the the reference coordinates for the Beaumont allocation, the Beaumont applicants may not avail themselves of Section 73.213 of the Commission's Rules. Rather, Serna contends, the applicants are required to fully protect the application filed by Sadlier Gill pursuant to the provisions of 47 C.F.R. §73.207(b). Furthermore, Serna contends, when the provisions of Section 73.207 of the Commission's Rules are applied, the applications are impermissably short spaced and must be dismissed.

5. Had Sadlier-Gill's application to modify the facilities of KATY-FM not been filed during the window for the Beaumont, California allocation, it would have been processed under the Commission's "first-come-first-served" processing rules and the later-filed applications by Richmond, Lauryn, and Brindisi would have been placed in a queue behind Sadlier-Gill's application and returned upon the grant of a CP to Sadlier-Gill. See Memorandum Opinion and Order in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). However, because Sadlier-Gill's application was filed during the Beaumont window, the applications of Richmond, Lauryn, and Brindisi, as stated in footnote 1, are considered to be mutually exclusive with Sadlier-Gill's application and will be designated for hearing. Accordingly, Serna's petitions and informal objection will be denied.

6. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Sadlier-Gill in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That in accordance with paragraph 2, hereinabove, Sadlier-Gill shall submit the environmental assessment required by 47 C.F.R. §1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That the petitions to deny filed by Serna against the applications of Richmond and Lauryn and the informal objection filed by Serna against the application of Brindisi, in light of the discussion in paragraphs 4 and 5, hereinabove, ARE DENIED.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. See generally Proposals to Reform the Commission's Comparative Hearing Process (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), on reconsideration, FCC 91.154, paras. 7-8 & n.3, Appendix paras. 3 & 5, released May 15, 1991.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within

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not paid the requisite hearing fee by November 21, 1991, the date set forth in the Public Notice, Mimeo 14834, released September 20, 1991.

the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-9

In the Matter of

Redevelopment of Spectrum to	RM-7981
Encourage Innovation in the	RM-8004
Use of New Telecommunications	
Technologies	

ORDER EXTENDING TIME FOR REPLY COMMENTS

Adopted: January 7, 1993; Released: January 7, 1993

Reply Comment Date: January 27, 1993

By the Office of Engineering and Technology:

1. The Utilities Telecommunications Council (UTC) and the American Petroleum Institute (API) have requested an extension of time to file reply comments to the *Further Notice of Proposed Rule Making* in the above-captioned proceeding.

2. UTC and API request that the deadline for filing reply comments be extended from January 13, 1993, to January 27, 1993, in order to fully evaluate comments on the Commission's proposal and a detailed proposal filed in comments by the Telecommunications Industry Association's Fixed Point-to-Point Communications Section on December 11, 1992.

3. Requests for extensions of time are not routinely granted, 47 C.F.R. § 1.46(a). However, in order to develop as complete a record as possible, an extension of time is appropriate in this instance. This extension will permit all interested parties sufficient time to review the record and prepare reply comments on the complex issues presented in this proceeding. Accordingly, IT IS ORDERED, that the deadline for filing reply comments IS EXTENDED to January 27, 1993.

4. This action is taken under authority found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241, and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241, and 1.46. For further information, contact Rodney Small, Office of Engineering and Technology, (202) 653-8116.

FEDERAL COMMUNICATIONS COMMISSION

Bruce A. Franca
Acting Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Operating Companies Transmittal No. 745

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: January 7, 1993; Released: January 8, 1993

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On October 13, 1992, the GTE Telephone Operating Companies (GTOC) filed Transmittal No. 745 to establish a new fiber-optic video transport service, Videoband - Type II, which will be available in Florida. GTOC now provides only Videoband - Type I service in Florida on an individual case basis over microwave facilities. The Videoband - Type II service will be offered over fiber optic facilities and, according to GTOC, is designed to meet the new technical standards established by the Electronic Industries Association in concert with the Television Industries Association. Description and Justification at 1 (D&J). GTOC will permanently install fiber-optic facilities at various locations in the Tampa area where television events are likely to be held and will provide service to customers such as television stations and interexchange carriers (IXCs). Customers will generally be connected to the network through fiber.[1]

2. GTOC will assess a non-recurring ordering charge for Videoband - Type II service when a customer opens an account. Usage sensitive charges will be assessed on a per minute, hourly, daily and monthly basis. As soon as the charges for a customer's "continuous usage" at one rate level (*e.g.*, per minute) exceeds the charges for the next rate step (*e.g.*, daily), the charges will be capped and the lower rate applied. D&J at 1. Customers served at locations where compatible facilities do not exist may be subject to Special Construction charges.

3. The Florida Cable Television Association (FCTA) filed a petition to reject, or alternatively, suspend and investigate Transmittal No. 745 on October 27, 1992. GTOC replied to FCTA's petition on November 6, 1992. FTCA contends that Transmittal No. 745 incorporates illegal use restrictions, incorporates an unreasonable and discriminatory rate structure and does not include adequate cost justification. Petition at 4-13. Further, FCTA argues that the Videoband - Type II service established by Transmittal No. 745 may be the backbone for future video dialtone service and, as such, should be subject to a separate Section 214 review. Petition at 13-14. Finally, FCTA argues that video services tariffs such as this one should be rejected or held in abeyance until a tariff review plan is adopted which will satisfy the requirements imposed by the Commission's cost allocation rules. Petition at 14.

4. In its reply, GTOC argues that its rate structure is appropriate for this service, which is offered on a temporary basis, and that such rate structures are common industry practice. GTOC further maintains that the Videoband - Type II service is not "like" its DS3 services because of the technical characteristics of the services and the underlying cost structures. Reply at 6-8. Also, GTOC argues that the service offered in this transmittal is merely a transport service, similar to other transport services it offers, except that it is a video grade service. GTOC states that no separate Section 214 authorization has been required for such a transport service. Reply at 2-4. Further, GTOC states that the material it has filed in support of the transmittal shows that the proposed rates recover the direct costs and overhead expenses associated with this service and thereby complies with the price cap rules. Reply at 11. GTOC provided the Commission with additional cost support for its proposed rates.[2] Finally, GTOC filed an amendment which deletes the use restriction to which FCTA objects.[3]

5. The Bureau has reviewed Transmittal No. 745 and all associated submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate the GTE Telephone Operating Companies' Transmittal No. 745 filed by the Florida Cable Television Association, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

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[1] GTOC Transmittal No. 745, Tariff F.C.C. No. 1, 6th Revised Page 149.2.

[2] *See* letter from F. Gordon Maxson to Greg Vogt (December 21, 1992).

[3] *See* GTOC Transmittal No. 756, filed November 25, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

In reply, refer to:

Master of the Vessel PATRIOT 315HF0007
Carrying Ship Radio Station KGBQ

Thomas C. Von Haas
c/o Vulcan Carriers, Ltd.
New York, NY

NOTICE OF APPARENT LIABILITY

Adopted: January 8, 1993; Released: January 21, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for monetary forfeiture issued pursuant to Section 364(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §362, to Thomas C. Von Haas for operating the vessel PATRIOT, Official Number 571049, for voyages in the open sea without carrying at least one qualified radio officer as specified in Section 353(b) of the Act, 47 U.S.C. §353(b).

2. Pursuant to the Commission's policies and standards for assessing forfeitures, it appears that the appropriate amount of forfeiture for this violation would be $2,000.

II. BACKGROUND

3. Section 364(b) of the Communications Act of 1934, as amended, specifies that every willful failure on the part of the master of a ship to enforce or comply with the provisions of the Act or the rules and regulations of the Commission as to equipment, operators, watches, or radio service shall cause him to forfeit to the United States the sum of $1,000.

4. Section 353(b) of the Act, and 80.159(b) of the Rules, 47 C.F.R. §80.159(b), establish certain radio operator requirements designed to maintain a distress and safety communications net for vessels at sea.[1] Specifically, a cargo vessel must carry at least two radio officers unless it is equipped with an operational radiotelegraph auto alarm. If it carries an operational radiotelegraph auto alarm, it may carry only one radio officer *provided* that the radio officer carried has had at least six months of previous service aboard vessels of the United States as confirmed by an appropriate endorsement on his radio operator authorization. It appears that Vulcan Carriers, Ltd., owners of the vessel PATRIOT upon which Mr. Von Haas served as Master, employed Mr. Joseph Sawchuk, IV as sole radio officer prior to his first class radiotelegraph operator's certificate having been endorsed to confirm his prior six months of service aboard United States ships. Lack of the proper endorsement on Mr. Sawchuk's radio operator authorization resulted in his being unqualified for the radio officer service for which he was employed. This caused the vessel to be in violation of Section 351(a)(1) of the Act, 47 U.S.C. §351(a)(1), and the ship's radio station to be in violation of Section 80.159(b) of the Rules, 47 C.F.R. §80.159(b).

5. Mr. Sawchuk was the sole radio officer aboard the vessel PATRIOT while it travelled from Yokosuka, Japan, to Yanbu, Saudi Arabia, and then to Diego Garcia, B.I.O.T., between October 1, 1991, and November 5, 1991, as evidenced by a July 8, 1992, letter from Vulcan Carriers, Ltd., the station licensee.

6. The radio logs that Mr. Sawchuk submitted with his endorsement application indicate that he sailed again as sole radio officer aboard the PATRIOT when it sailed in the open sea from Diego Garcia on January 19, 1992, to the west coast of Saudi Arabia (latitude 21-14 north, longitude 37-51 east), and then back to Diego Garcia, arriving on February 9, 1992.

III. DISCUSSION

7. Section 353(b) of the Act prohibits a radio officer from serving as sole radio officer until he has accumulated at least six months of prior service as a radio officer aboard a vessel or vessels of the United States. At the time he was employed as sole radio officer aboard the PATRIOT, Mr. Sawchuk lacked the required endorsement on his radio operator authorization to confirm that he possessed the necessary qualifications. Thus he was unqualified for the position of sole radio officer. By employing Mr. Sawchuk as a sole radio officer when he was unqualified to hold that position, and by causing the vessel to sail on various voyages in the open sea while he served as sole radio officer, Vulcan Carriers violated Section 351(a)(1) of the Act.

8. The violation was willful and repeated in that the action of sailing was intentional and comprised at least four individual departures for voyages in the open sea.

9. Under Section 364 of the Communications Act of 1934, as amended, 47 U.S.C. §362, both the vessel's owner and master are individually liable for their own action or inaction.

10. Under our *Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd. 4695 (1991)*, modified in part on recon., FCC 92-212, 7 FCC Rcd. 5339 (1992), and Section 364(b) of the Act, 47 U.S.C. §362(b), the prescribed statutory amount of $1,000 per occurrence is used as the base amount for a violation of any provision of Title III, Part II of the Act. During Mr. Sawchuk's period of service the

[1] These provisions require that each cargo ship equipped with a radiotelegraph station in accordance with Part II of Title III of the Communications Act, and which has a radiotelegraph auto alarm, must carry a radio officer "who shall have had at least six months previous service in the aggregate as a radio officer in a station on board a ship or ships of the United States." See *Section 353(b) of the Act, 47 U.S.C.* §353(b) and Section 13.12(b), 47 C.F.R. §13.12(b). The Commission currently requires that radio officers obtain an endorsement to their first or second class radiotelegraph operator's certificate as evidence of the six-months service. See *In the Matter of Amendments of Parts 13 and 80 of the Rules Concerning Ship Radio Officer Qualifying Service Endorsements*. 3 FCC Rcd. 6351 (1988).

vessel made four departures for voyages on the open sea. The time limit for the assessment of a forfeiture for the first two departures has now expired and no penalty will be assessed for those violations. The second two departures, however, are within the statutory period. Each departure is considered to be a separate occurrence. Therefore, the forfeiture amount is $2,000. No further adjustments appear warranted.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Section 364(b) of the Communications Act of 1934, as amended, 47 U.S.C. §362(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that Thomas C. Von Haas IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $2,000 for sailing in the open sea without carrying at least one qualified radio officer as required by Section 351(a)(1) of the Communications Act and Section 80.159(b) of the Commission's Rules.

12. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that Thomas C. Von Haas, shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation.[2] Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct. No. 315HF0007" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Attn: NAL/Acct. No. 315HF0007
Stop Code 1500E3
1919 M St. N.W.
Washington DC 20554

13. IT IS FURTHER ORDERED that this notice shall be sent, by certified mail, to Thomas C. Von Haas, Vulcan Carriers, Ltd., C/O Mackay Communications, P. O. Box 58649, Raleigh NC 27658. A copy shall also be sent, by certified mail, to Thomas C. Von Haas, C/O Vulcan Carriers, Ltd., 41 East 42nd Street, Suite 1700, New York NY 10017.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[2] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

In reply, refer to:

Licensee of Ship Radio Station KGBQ 315HF0006
aboard the vessel PATRIOT

Vulcan Carriers, Ltd. New York, NY

NOTICE OF APPARENT LIABILITY

Adopted: January 8, 1993; Released: January 21, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for monetary forfeiture issued pursuant to Section 364(a) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §362, to Vulcan Carriers, Ltd. for operating the vessel PATRIOT, Official Number 571049, for voyages in the open sea without carrying at least one qualified radio officer as specified in Section 353(b) of the Act, 47 U.S.C. §353(b).

2. Pursuant to the Commission's policies and standards for assessing forfeitures, it appears that the appropriate amount of forfeiture for this violation would be $20,000.

II. BACKGROUND

3. Section 353(b) of the Act, and 80.159(b) of the Rules, 47 C.F.R. §80.159(b), establish certain radio operator requirements designed to maintain a distress and safety communications net for vessels at sea.[1] Specifically, a cargo vessel must carry at least two radio officers unless it is equipped with an operational radiotelegraph auto alarm. If it carries an operational radiotelegraph auto alarm, it may carry only one radio officer *provided* that the radio officer carried has had at least six months of previous service aboard vessels of the United States as confirmed by an appropriate endorsement on his radio operator authorization. It appears that Vulcan Carriers, Ltd. employed Mr. Joseph Sawchuk, IV as sole radio officer prior to his first class radiotelegraph operator's certificate having been endorsed to confirm his prior six months of service aboard United States ships. Lack of the proper endorsement on Mr. Sawchuk's radio operator authorization resulted in his being unqualified for the radio officer service for which he was employed. This caused the vessel to be in violation of Section 351(a)(1) of the Act, 47 U.S.C. §351(a)(1), and the ship's radio station to be in violation of Section 80.159(b) of the Rules, 47 C.F.R. §80.159(b).

4. Mr. Sawchuk was the sole radio officer aboard the vessel PATRIOT while it travelled from Yokosuka, Japan, to Yanbu, Saudi Arabia, and then to Diego Garcia, B.I.O.T., between October 1, 1991, and November 5, 1991, as evidenced by a July 8, 1992, letter from Vulcan Carriers, Ltd., the station licensee.

5. The radio logs that Mr. Sawchuk submitted with his endorsement application indicate that he sailed again as sole radio officer aboard the PATRIOT when it sailed in the open sea from Diego Garcia on January 19, 1992, to the west coast of Saudi Arabia (latitude 21-14 north, longitude 37-51 east), and then back to Diego Garcia, arriving on February 9, 1992.

III. DISCUSSION

6. Section 353(b) of the Act prohibits a radio officer from serving as sole radio officer until he has accumulated at least six months of prior service as a radio officer aboard a vessel or vessels of the United States. At the time he was employed as sole radio officer aboard the PATRIOT, Mr. Sawchuk lacked the required endorsement on his radio operator authorization to confirm that he possessed the necessary qualifications. Thus he was unqualified for the position, of sole radio officer. By employing Mr. Sawchuk as a sole radio officer when he was unqualified to hold that position, and by causing the vessel to sail on various voyages in the open sea while he served as sole radio officer, Vulcan Carriers violated Section 351(a)(1) of the Act.

7. The violation was willful and repeated in that the action of sailing was intentional and comprised at least four individual departures for voyages in the open sea.

8. Under our *Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd. 4695 (1991)*, modified in part on recon., FCC 92-212, 7 FCC Rcd. 5339 (1992), and Section 364(a) of the Act, 47 U.S.C. §362(a), the base amount for a violation by a U.S. ship of any provision of Title III, Part II of the Act is $5,000 per day or per occurrence. During Mr. Sawchuk's period of service the vessel made two voyages on the open sea involving four departures. Section 364(a) of the Act, 47 U.S.C. §362(a), specifies that each departure or attempted departure of the ship, and in the case of a ship of the United States each day during which such navigation occurs shall constitute a separate offense. The time limit for assessment of a forfeiture for the first voyage has now expired and no penalty will be assessed for those violations. The second voyage is within the statutory period. It involved two departures and sailing over a period of 22 days. Each day of sailing constitutes a separate violation. However, considering Vulcan's past history of compliance with Commission requirements, we believe the forfeiture amount of $20,000 to be adequate and no further upward or downward adjustment appears warranted.

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[1] These provisions require that each cargo ship equipped with a radiotelegraph station in accordance with Part II of Title III of the Communications Act, and which has a radiotelegraph auto alarm, must carry a radio officer "who shall have had at least six months previous service in the aggregate as a radio officer in a station on board a ship or ships of the United States." See *Section 353(b) of the Act, 47 U.S.C.* §353(b) and Section 13.12(b), 47 C.F.R. §13.12(b). The Commission currently requires that radio officers obtain an endorsement to their first or second class radiotelegraph operator's certificate as evidence of the six-months service. See *In the Matter of Amendments of Parts 13 and 80 of the Rules Concerning Ship Radio Officer Qualifying Service Endorsements*. 3 FCC Rcd. 6351 (1988).

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 364(a) of the Communications Act of 1934, as amended, 47 U.S.C. §362(a), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that Vulcan Carriers, Ltd. IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $20,000 for sailing in the open sea without carrying at least one qualified radio officer as required by Section 351(a)(1) of the Communications Act and Section 80.159(b) of the Commission's Rules.

10. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that Vulcan Carriers, Ltd., shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation.[2] Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct. No. 315HF0006" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Attn: NAL/Acct. No. 315HF0006
Stop Code 1500E3
1919 M St. N.W.
Washington DC 20554

11. IT IS FURTHER ORDERED that this notice shall be sent, by certified mail, to Vulcan Carriers, Ltd., C/O Mackay Communications, P.O. Box 58649, Raleigh NC 27658. A copy shall also be sent, by certified mail, to Vulcan Carriers, Ltd., 41 East 42nd Street, Suite 1700, New York NY 10017.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[2] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 11, 1993

CONSUMER ALERT

TELEPHONE SOLICITATIONS, AUTODIALED AND ARTIFICIAL OR PRERECORDED VOICE MESSAGE TELEPHONE CALLS, AND THE USE OF FACSIMILE MACHINES

The following information has been prepared to answer questions consumers may have about federal rules and regulations that apply to telephone solicitations, automated and artificial or prerecorded voice message telephone calls and facsimile (fax) messages.

DOES THE FCC REGULATE "LIVE" TELEPHONE SOLICITATIONS AND AUTOMATED CALLS?

Yes. Effective December 20, 1992, FCC rules place restrictions on the use of automatic telephone dialing systems ("autodialers"), artificial or prerecorded voice messages, and the use of telephone facsimile machines to send unsolicited advertisements. (An autodialer is defined as equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator.) The rules also provide residential telephone subscribers with a means to avoid unwanted "live" solicitation calls at home. These rules are based on a federal statute known as the Telephone Consumer Protection Act (TCPA).[1]

HOW IS THE TERM "TELEPHONE SOLICITATION" DEFINED?

The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person. The term does not include a call or message (1) to any person with that person's prior express invitation or permission, (2) to any person with whom the caller has an established business relationship, or (3) by a tax exempt nonprofit organization.

DOES THE FCC REGULATE ARTIFICIAL OR PRERECORDED VOICE CALLS PLACED TO MY HOME?

Yes. FCC rules prohibit artificial (computerized) or prerecorded voice calls to your residence, except in emergencies or where the resident has given prior express consent to such calls. However, the following types of calls are exempt from this prohibition and are therefore permitted: non-commercial calls (for example from charitable entities, polling organizations, political or government agencies); calls which do not include any unsolicited advertisements; calls by or on behalf of tax-exempt nonprofit organizations; and calls from entities with whom you have an "established business relationship."

WHAT IS AN "ESTABLISHED BUSINESS RELATIONSHIP?"

You have an "established business relationship" with a person or business if you have made an inquiry, application, purchase or transaction regarding its products or services. You may end an "established business relationship" by telling the person or entity that you do not want to receive any more calls or solicitations from them.

DOES THE FCC RESTRICT SOLICITATION CALLS PLACED TO MY HOME TO CERTAIN HOURS OF THE DAY?

Yes. FCC rules ban telephone solicitations between the hours of 9 p.m. and 8 a.m. (local time at your home).

ARE TELEPHONE SOLICITORS REQUIRED TO IDENTIFY THEMSELVES?

Yes. Persons or entities making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number at which the person or entity may be contacted.

HOW CAN I AVOID FUTURE "LIVE" TELEPHONE SOLICITATION CALLS TO MY HOME?

You can avoid "live" telephone solicitations to your home by stating clearly when you receive such calls that you do not want to receive any further solicitations from that person or entity. Under FCC rules, the person or entity making the call must keep a record of your request, or a "do-not-call" list, and may not make further telephone solicitations to your home.

This should stop all calls from that specific person or entity. It should also stop calls from affiliated entities where, due to the identification of the caller and the product being advertised, the residential subscriber would reasonably expect that the request applies to affiliated entities. However, the do-not-call list applies only to the person or entity placing the call. Each time you receive a call from a different person or entity you must request that person or entity not to call you again. Tax-exempt nonprofit organizations are not required to keep "do-not-call" lists.

HOW CAN I STOP TELEPHONE SOLICITATIONS *BEFORE* A CALL IS MADE?

If you want to avoid telephone solicitations to your home *before* a call is made, the Telephone Preference Service of the Direct Marketing Association (DMA) commercially publishes and markets lists of telephone subscribers who do not wish to receive solicitation calls. To be included on the list, you should send your name, tele-

[1] On December 18, 1992, the United States District Court for the District of Oregon issued a preliminary injunction enjoining the Commission from enforcing §227 (b) (1) (B) of the Telephone Consumer Protection Act of 1991 pending judicial action on a lawsuit challenging the constitutionality of that section §227 (b) (1) (B) prohibits calls using artificial or prerecorded messages to residential telephone subscribers). The injunction applies nationwide, and affects only FCC enforcement of (§227 (b) (1) (B).

phone number (including the area code) and address (including the zip code) to the Telephone Preference Service, Direct Marketing Association, P.O. 9014, Farmington, New York 11735-9014. Registration should reduce the number of unsolicited calls placed to your home or business, but may not stop all unwanted calls. Questions about the DMA's registration program should be addressed to DMA at the address given above.

DOES THE FCC REGULATE TELEPHONE SOLICITATIONS AND AUTOMATED CALLS PLACED TO BUSINESSES?

Yes. FCC rules prohibit the use of autodialers in a way that simultaneously engages two or more lines of a multi-line business. Also, autodialed calls must contain certain identifying information about the caller. In addition, individual state regulations may apply to in-state calls to businesses.

FCC rules do not require that telemarketers maintain records of requests from businesses who do not wish to receive solicitations.

DO FCC RULES DO ANYTHING TO STOP RANDOM AND PRERECORDED CALLS PLACED TO EMERGENCY NUMBERS OR TO MY CELLULAR TELEPHONE NUMBER OR PAGER NUMBER?

Yes. Except in emergencies or with prior express consent of the person called, FCC rules prohibit the use of autodialers or prerecorded voice messages to call numbers assigned to:

* emergency telephone lines, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency

* guest or patient rooms of a hospital, health care facility, elderly home, or similar establishment

* cellular, paging, or other radio common carrier services

* services for which you (as the person being called) would be charged for the call.

DO FCC RULES BAN UNSOLICITED ADVERTISEMENTS SENT TO FACSIMILE MACHINES?

Yes. Effective December 20, 1992, FCC rules ban the transmission of unsolicited advertisements to telephone facsimile machines. No person may transmit an advertisement describing the commercial availability or quality of any property, goods, or services to a telephone facsimile machine without the prior express permission or invitation of the party receiving the facsimile.

DO FCC RULES REQUIRE THAT I IDENTIFY MYSELF ON FACSIMILE MESSAGES THAT I SEND?

Yes. FCC rules require that any message sent to a telephone facsimile machine must clearly mark (1) the date and time of the transmission, (2) the identity of the sender, and (3) the telephone number of the sender or of the sending machine. This information must be placed either on the first page or on each page of the message.

In addition, all telephone facsimile machines manufactured on or after December 20, 1992, must clearly mark such identifying information on the first page or on each page of the transmission.

DOES THE FCC REGULATE AUTOMATED CALLS AND TELEPHONE SOLICITATIONS PLACED LOCALLY WITHIN MY STATE?

Yes. FCC rules apply to in-state calls.

In addition, states may apply their own regulations to in-state calls for the following types of calls if those regulations are more restrictive than FCC rules: (1) calls using autodialers or artificial or prerecorded voice messages, (2) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements, and (3) the making of telephone solicitations.

WHO RESOLVES DISPUTES INVOLVING VIOLATIONS OF THE TCPA AND THE FCC'S RULES?

If you receive --

a "live" telephone solicitation from an entity or business on two or more occasions within any 12-month period after you have asked that entity or business not to call you, or

an artificial or prerecorded voice call at your residence in violation of FCC rules, or

an unsolicited advertisement on your telephone facsimile machine, or

autodialed calls that simultaneously engage two or more multi-line business lines you may take the following actions:

* contact the solicitor or business directly using the "telephone number or address provided by the solicitor to have "the calls stopped

* file suit in state court (if your state permits such actions) to stop such calls and/or file suit for actual monetary loss. The penality is $500 in damages or actual monetary losses (whichever is greater)

The following state offices may be able to help you in filing suit:

your local or state consumer protection office

your state public utilities commission

your state Attorney General's office

(you should be able to obtain telephone numbers for these offices from the government section of your telephone directory or from directory assistance)

* request FCC enforcement action on suspected violations of FCC rules.

Also, states can initiate a civil action in federal district court against any person or entity that engages in a pattern or practice of violations of the TCPA or the FCC rules.

HOW DO I REQUEST FCC ACTION ON SUSPECTED VIOLATIONS OF THE TCPA OR THE FCC'S RULES?

Although the FCC cannot award damages except under very limited circumstances, you may request action on violations through the informal procedures set forth in Section 1.41 of the FCC's rules, 47 C.F.R. §1.41. Your request should include a reference to Section 1.41 of the FCC's rules, 47 C.F.R. §1.41, Section 227 of the Communications Act, 47 U.S.C. §227, and Section 64.1200 of the FCC's rules, 47 C.F.R. §64.1200.

Your request can be submitted in a letter in your own words and should clearly and concisely state the facts, the relief sought, and your interest in submitting the request for action. Your request should include facts such as the following: the name, address and telephone number of the organization placing the call(s); the date you requested to be added to the company's "do-not-call" list; the dates and times that you received calls from the organization; copies of any unsolicited advertisements that were sent to your facsimile machine in violation of the TCPA and the FCC's rules; and any other information that would be helpful in processing your request. Your request for FCC action also should state whether or not you have filed suit in state court, including the state where any such suit was filed. Your request should be addressed to the Informal Complaints and Public Inquiries Branch, Enforcement Division, Common Carrier Bureau, FCC, Mail Stop 1600A2, Washington, D.C. 20554.

WHERE SHOULD I FILE COMPLAINTS IF I SUSPECT THAT TELEPHONE SOLICITATION PRACTICES ARE FALSE, DECEPTIVE OR FRAUDULENT?

1) Complaints regarding false or deceptive telephone solicitation sales practices should be addressed to the Federal Trade Commission, Indiana Building, Washington, D.C. 20580.

2) Fraud by wire is prohibited by Title 18, United States Code, Section 1343, which is a federal criminal statute enforced by the Department of Justice. Complaints regarding fraud by wire should be directed to the Federal Bureau of Investigation (FBI) office located in your area. You should be able to obtain a telephone number for your local FBI office from the government section of your telephone directory or from directory assistance.

3) Complaints regarding information or products received through the United States Postal Service (USPS) in connection with fraudulent telephone solicitation practices should be addressed to the Chief Postal Inspector, 475 L'Enfant Plaza, S.W., Washington, D.C. 20260-2181.

I PAY EXTRA MONEY FOR AN UNLISTED OR NON-PUBLISHED NUMBER. WHY DO I RECEIVE CALLS FROM SOLICITORS?

You may receive some unsolicited calls even though you have unlisted or unpublished telephone service. Your telephone number may be included on lists of names, addresses, and telephone numbers which are sold as possible sales prospects in particular product categories. Also, some sales organizations commonly call all numbers in a sequence for a given neighborhood or telephone exchange prefix, such as the 632-6000 exchange series. Calls made sequentially are not screened to reflect their unlisted status, and the calling party generally will not know the identity of the party reached.

WHY CAN'T I DISCONNECT CALLS PLACED BY AUTODIALERS?

Any prerecorded call made using an autodialer must release your line within 5 seconds of notice to the caller that you have hung up. However, in some telephone exchanges the person receiving the call must allow 25 seconds after hanging up for the caller to receive notice that it should disconnect the call. If the telephone receiver is picked up before 25 seconds has elapsed, the disconnect timing mechanism is reactivated, causing the recorded message to continue or to repeat the message. You should contact the business office of your local telephone company to determine whether calls immediately disconnect in your area, or whether you should wait 25 seconds before picking up the receiver.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Application File No. BRH-880927YV
of Gulfcoast Broadcasting, Inc.,
Licensee of Station WMMK(FM)
Destin, Florida

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1993; Released: January 22, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration a timely filed petition by the Florida State Conference of Branches of the NAACP and its respective branches requesting that the Commission reconsider its decision to grant Gulfcoast Broadcasting, Inc.'s (Gulfcoast) renewal application with reporting conditions and a $15,000 forfeiture[1] in *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893 (1990) (*Miami*) and the licensee's opposition to the petition.

II. PROCEDURAL MATTERS

2. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. Section 405, states that any party to an order, decision, report or action by the Commission or any other person aggrieved or whose interests are adversely affected may petition for reconsideration. 47 C.F.R. Section 1.106; *see also Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984) (*Community Access*). To qualify as a party, a petitioner requesting reconsideration must have filed a valid petition to deny against the application. *See University of North Carolina*, 4 FCC Rcd 2780 (1989) (*WUNC-TV*); *Montgomery County Broadcasting Corp., Montgomery City, Missouri*, 65 FCC 2d 875 (1977) (*Montgomery*); *Redwood Microwave Association Inc. Mount Sanherdin, Pratt Mountain and Mt. Pierce, California*, 61 FCC 2d 442 (1976) (*Redwood*). If the petition for reconsideration is filed by one "who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. Section 1.106(b)(1); *Community Access, supra*.

3. In *Miami*, the Commission ruled that the NAACP had not achieved party-in-interest status because the NAACP filed the declaration in support of its petition against WMMK 49 days late. Moreover, the NAACP failed to provide any explanation as to why the declaration was untimely filed. As the Commission held in *Miami* and we continue to hold, we will not acquiesce to late filings without substantial justification. *See Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988). Thus, NAACP's renewal challenge was properly treated as an informal objection.

4. As an informal objector, the NAACP lacks standing to bring the instant petition because it is not a "party to the proceeding" within the meaning of Section 405 of the Act and Section 1.106 of our rules. The NAACP has not demonstrated in its pleading that it was adversely affected by our decision in *Miami* or that it was not possible for it to participate in the earlier stages of the proceeding as a party. Hence, we find that the NAACP has not complied with the procedural requirements of Section 1.106. *See* 47 C.F.R. Section 1.106; *WUNC-TV, supra; Montgomery, supra; Redwood, supra*. Therefore, we must dismiss the NAACP's petition for reconsideration.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed September 10, 1990, by the NAACP IS DISMISSED.

6. IT IS FURTHER ORDERED that the Secretary of the Commission send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] We note that Gulfcoast timely paid the forfeiture.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 8, 1993

Released: January 22, 1993

CERTIFIED MAIL NO. P 295 670 722
RETURN RECEIPT REQUESTED

Dynamic Micro Systems
Suite 5
2155 Palm Bay Road NE
Palm Bay, Florida 32905

Attention: Mr. Walter Bowles, Jr.
President

Mail Stop 1500E3
Re: Notice of Forfeiture
issued to Dynamic Micro
on June 25, 1992.
215 VB 0002

Dear Dynamic Micro Systems:

This is in response to your Petition for Reconsideration dated July 22, 1992, submitted to the Federal Communications Commission (FCC) under Section 1.106 of the FCC's rules, 47 C.F.R. Section 1.106. The Petition objected to a $17,000 monetary forfeiture penalty that had been issued by the FCC's Vero Beach, Florida Office to Dynamic Micro Systems (Dynamic). As explained below, we are affirming the $17,000 monetary forfeiture penalty.

Our records show that on July 15, 1991, an FCC inspector visited Dynamic's retail computer store in Melbourne, Florida. He observed that Dynamic was offering for sale Dynamic 286 AT, Dynamic 386 SX, Dynamic 386 and Dynamic 486 personal computers that had not been authorized by the FCC although there were labels on the computers indicating that they had been authorized. Furthermore, the labels on the above computers had the same FCC identifier code which would have been impossible since each type of computer has its own unique identifier code. On July 25, 1991, the FCC's Vero Beach Office wrote Dynamic warning that the marketing of computers that had not been authorized by the FCC violated the FCC's rules. Dynamic responded on August 5, 1991.

On February 24, 1992, an FCC inspector again visited Dynamic's store and observed that it was offering for sale a Dynamic 386 personal computer that lacked FCC authorization. Dynamic wrote the FCC on March 4, 1992, explaining the action it was taking to comply with the FCC's rules.

On May 21, 1992, the FCC's Vero Beach Office issued Dynamic a Notice of Apparent Liability for violating Section 302(b) of the Communications Act of 1934, and Section 2.803 of the FCC's rules by marketing computers that had not been authorized by the FCC on July 15, 1991, and February 24, 1992. 47 U.S.C. Section 302(b), 47 C.F.R. Section 2.803. Dynamic responded on June 16, 1992. On June 23, 1992, the FCC's Vero Beach Office issued Dynamic a Notice of Forfeiture for a $17,000 monetary forfeiture penalty.

Section 302 of the Communications Act authorizes the FCC to regulate the interference potential of radio frequency devices, and prohibits the marketing of devices that fail to comply with the FCC's rules. Section 2.803 of the FCC's rules prohibits the marketing; including the offering for sale, displaying and advertising; of radio frequency devices that have not received FCC authorization. Personal computers must be authorized by the FCC. 47 C.F.R. Sections 15.3(i), (r) and (s), and 15.101. Furthermore, an FCC authorized device must have a label, which includes an FCC identifier, reflecting that the device has been authorized by the FCC. 47 C.F.R. Sections 2.925, 2.926 and 15.19. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934, 47 U.S.C. Section 503(b).

Dynamic states several reasons why it should not be subject to a monetary forfeiture penalty. Dynamic explains that when the FCC inspector visited its retail store on July 15, 1991, Dynamic "made it clear ... that we planned to continue to sell the computer systems in question as we worked to resolve the problem" and that in its August 5, 1991, letter to the FCC, Dynamic "pointed out that it would take some time for us to come into compliance with the legal requirements and requested postponement of enforcement action." Dynamic further explains that "Both verbally at the time" of the July 15, 1991, inspection "and implicitly in his lack of response to the pointed request in ..." Dynamic's August 5th letter, the FCC inspector "implied that the continued sale of the uncertified systems while we attempted to resolve the problem was acceptable."

The FCC inspector during his July 15, 1991, inspection told Dynamic that the FCC's rules prohibited it from continuing to market computers that had not been authorized by the FCC, and provided Dynamic with an FCC bulletin that explained the relevant FCC rules. Moreover, the FCC's letter, to Dynamic on July 25, 1991, stated that "The sale of the above described, uncertified ... equipment is a violation of marketing requirements and could result in a monetary forfeiture." Dynamic responded on August 5, 1991, that "It is our belief that the computer equipment we offer for sale to the general public is required to be certified as Class B Certified and it is our absolute intention that we sell only that equipment which is properly certified." Thus, Dynamic clearly stated that it would only sell computers that had been authorized by the FCC.

Dynamic, however, near the end of its letter said "Since our business consists solely of the sale and service of these computer systems, I would sincerely request your postponing further action while we work to obtain the necessary Certification." This statement does not suggest that Dynamic intended to continue to sell unauthorized computers while awaiting approval from the FCC, especially after Dynamic had said "it is our absolute intention that we sell only" FCC authorized computers. Even if Dynamic had clearly stated that it would continue to sell unauthorized computers, this would not result in a waiver of the FCC's rules. The FCC had clearly stated its position, and a unilateral contrary statement by Dynamic does not have the effect of abrogating the FCC's enforcement policy.

Dynamic did not clearly request permission from the FCC to sell unauthorized computers in its August 5th letter or at any other time before the FCC inspection on February 24, 1992, and the FCC did not respond to the August 5th letter by authorizing the continued sale of computers that had not been approved by the FCC. It is, moreover, unlikely that the FCC would approve a request of this nature.

Dynamic also states that the monetary forfeiture penalty should not be imposed because it took corrective action. However, remedial action to correct a violation, although commendable, does not nullify a forfeiture penalty. *E.g., Station KGVL, Inc.* 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966). Dynamic stated in its June 16, 1992, response to the FCC's Notice of Apparent Liability that it did not sell "any systems for a week [after the February 24, 1992, FCC inspection] while I lined up another distributor." This is action that Dynamic should have taken immediately after it was first inspected and informed of the violation in July 1991.

According to Dynamic, "The Certification labels on our complete systems were supplied by the system supplier, who alleged that they were valid Certifications." However, no evidence was provided that Dynamic was misled by its system supplier. The four types of computers inspected on July 15, 1991, had the same FCC identifier code on the FCC required labels which should have alerted a buyer of a possible discrepancy. Each type of computer has its own unique identifier code. 47 C.F.R. Section 2.926. The violation that was observed during the February 24, 1992, inspection did not involve the marketing of unauthorized computers with improper labels, but instead the marketing of an unauthorized computer without any label.

Finally, Dynamic states that the violations were not willful as charged in the FCC's Notice of Apparent Liability. Dynamic was correctly charged with a willful violation. Section 312(f)(1) of the Communications Act of 1934 defines a willful violation as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act ... ." 47 U.S.C. Section 312(f)(1). Willfulness exists if there is a voluntary act in that a person knew that he was doing the act in question such as displaying or attempting to sell a computer. Furthermore, to establish a willful violation, it is not necessary to establish that a person knew he was violating an FCC rule. *E.g., Southern California Co.*, 6 FCC Rcd. 4387 (1991).

Please submit the $17,000 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place the number 215 VB 0002 on the remittance and send it to:

Federal Communications Commission

Post Office Box 73482

Chicago, Illinois 60673-7482

If the $17,000 monetary forfeiture penalty is not paid within 30 days, the forfeiture case may be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-166

PUBLIC NOTICE

Released: January 14, 1993

MSS Above 1 GHz Negotiated Rulemaking Committee

Agency: Federal Communications Commission

Action: Notice of public meetings.

Summary: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice advises interested persons of the third and fourth meetings of the MSS Above 1 GHz Negotiated Rulemaking Committee ("Committee").

Dates: *Meeting No. 3:* Thursday, February 4, 1993 at 9:30 a.m. *Meeting No. 4:* Wednesday, February 10, 1993 at 9:30 a.m.

Addresses: *Meeting No. 3:* Federal Communications Commission, Rm. 856, 1919 M Street, N.W., Washington, D.C. 20554.

Meeting No. 4: Law Offices of Steptoe & Johnson, 1330 Connecticut Avenue, N.W., Concourse Level, Conference Room, Washington, D.C. 20036-1795.

For additional information contact: Kathleen Campbell, Administrative Assistant to the Committee, at (202) 634-1952.

Supplementary Information: The agenda for both meetings of the MSS Above 1 GHz Negotiated Rulemaking Committee is as follows:

1. Opening Remarks/Comments
2. Adoption of Agenda
3. Minutes/Records of Previous Meeting
4. Introduction of Documents
5. Informal Working Group Reports
   -Issues
6. Acceptance/Approval of Recommended Rules
7. Acceptance/Approval of Report Text
8. Agenda for future meetings
   -Schedule for future meetings
9. Other Business

Members of the general public may attend this meeting. The Federal Communications Commission will attempt to accommodate as many people as possible. However, admittance will be limited to the seating available. There will be no public oral participation, but the public may submit written comments to Fern J. Jarmulnek, the Committee's Designated Federal Officer, before the meeting.

In Public Notice, DA 93-24 (released January 8, 1993), the subsequent meeting date schedule included Monday, February 8 as the date for a meeting of this Committee. There will be no meeting for the full committee on February 8. This meeting is now scheduled for February 10 as indicated in this notice. Subsequent Committee meetings are currently scheduled for Thursday, February 18; Thursday, February 25; Thursday, March 4; Tuesday, March 9; Thursday, March 18; Thursday, March 25; and Friday, April 2. All subsequent Committee meetings noted in this paragraph are scheduled to begin at 9:30 A.M. at the Federal Communications Commission, 1919 M Street, N.W., Room 856, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 4, 1993

Released: January 22, 1993

8210-MD
92070187

George E. Mills, Jr., Trustee
Former Licensee, WAYK(TV), Melbourne, FL
9334 Bay Vista Estates Boulevard
Orlando, FL 32819

Dear Mr. Mills:

This is in further reference to our investigation concerning children's programming on WAYK(TV), Melbourne, Florida.

We find that WAYK(TV)'s broadcast of "Jana of the Jungle" and "Space Kidettes," between 6 and 7 a.m. on Saturday morning, January 11, 1992, violated the commercial limits imposed by our rules implementing the Children's Television Act of 1990. *See Report and Order*, 6 FCC Rcd 2111 (1991), and *Memorandum Opinion and Order*, 6 FCC Rcd 5093 (1991). The one-hour block of programming contained commercials in excess of the 10.5-minute-per-hour limit applicable to weekend children's programming. 47 C.F.R. § 73.670.

In your letter of June 29, 1992, you state that the one-minute overage was unintentional. You explain that the station at the time in question was operating under the supervision of the Federal Bankruptcy Court pursuant to Chapter 7, with new management appointed on behalf of the creditors to supervise a seriously understaffed operation.

Since you are no longer the licensee, and under all of the circumstances of this case, we will take no further action in this matter except to ADMONISH you for the violation noted on January 11, 1992.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 5, 1993

Released: January 22, 1993

Tak Communications, Inc., D.I.P. 1800C1MD
Licensee, KITV(TV), Honolulu, HI 92060834
5727 Tokay Boulevard
Madison, WI 53719

Dear Licensee:

This is in further reference to our investigation concerning children's programming on KITV(TV), Honolulu, Hawaii.

On Saturday morning, January 11, 1992, between 9 and 10 a.m., Television Station KITV, Honolulu, Hawaii, broadcast an hour of children's programming which contained 12.5 minutes of commercials, violating the weekend commercial limits of 47 C.F.R. § 73.670 by 2 minutes. That hour of programming consisted of the second half of the 60-minute cartoon program "Bugs & Tweety" and the 30-minute cartoon program "Hammerman."

In your letter dated June 30, 1992, responding to our June 16, 1992, letter of inquiry, you explain that the overage was the result of the unique situation of Hawaii network television stations, which, because of the significant time difference between the U.S. mainland and Hawaii, must air network shows such as those at issue here on delayed feed arrangements. A program such as "Bugs & Tweety," designed originally to air at 11 a.m. Eastern Standard Time, would air at 6 a.m. in Honolulu (five hours earlier) unless delayed. You state that the show airs at 10 a.m. Pacific Standard Time, and that you arranged with the network to begin the show at 8:30 a.m. Your decision to start this show on the half hour instead of on the hour, you explain, inadvertently distributed the 10.5 minutes of commercial time in "Bugs & Tweety" such that only 3 minutes appeared in the first half hour while 7.5 minutes ended up in the second. That, combined with the 5 minutes of commercial time in "Hammerman," took you over the limit for the hour 9 to 10 a.m.

You state that, upon learning of this problem from our letter, you rearranged your children's programming schedule to begin "Bugs & Tweety" on the hour, at 8 a.m., to avoid a recurrence of the violation. You submit that the violation was *de minimis* (two minutes in excess), occurred soon after the new rule went into effect on January 1, 1992, and was the result of special circumstances unique to Hawaii broadcasters. For these reasons, you ask that no sanctions be imposed.

When the rules went into effect on January 1, 1992, it was after considerable delay (the rules were adopted in April 1991), in part to afford broadcasters the additional time to "hone their plans to ensure compliance." As we further stated in *Children's Television Programming*, 6 FCC Rcd 5529, 5530 n.10 (1991), "[I]n the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of transitional difficulties." Furthermore, we do not consider a two-minute overage *de minimis*. We note that the Children's Television Act of 1990, under which our rules have been promulgated, suggests that a 1.5-minute difference in commercial minutes is significant in terms of establishing allowable limits for weekdays (12 minutes) versus weekends (10.5 minutes). We will, however, in this instance take into account the unusual time-delay factors that contributed to this oversight.

Accordingly, considering the circumstances described above that have caused special difficulties for Hawaii broadcasters, and which necessitated a program rescheduling for compliance purposes, we hereby ADMONISH you for said violation of our commercial limits by KITV(TV), Honolulu, Hawaii. This matter will be made a part of our permanent records.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 4, 1993

Released: January 22, 1993

WGN of Colorado, Inc. 1800C1MD
Licensee, KWGN-TV, Denver, CO 9204620
6160 South Wabash Way
P.O. Box 5222
Englewood, CO 80155

Dear Licensee:

This is in further reference to our investigation of children's programming on KWGN-TV, Denver, CO, and, in particular, its airing of commercials during "Dennis the Menace" and "Merrie Melodies" between 7 and 8 a.m. on Tuesday, January 14, 1992.

Because this one-hour block of programming appeared to violate the commercial limits imposed by our rules implementing the Children's Television Act of 1990, *see Report and Order*, 6 FCC Rcd 2111 (1991), and *Memorandum Opinion and Order*, 6 FCC Rcd 5093 (1991), we sent you a letter of inquiry on June 16, 1992. You have admitted, by letter dated July 2, 1992, that you did exceed the commercial limits in that hour of children's programming.

As to two 30-second spots initially noted as possible commercial overage, you state that they were public service announcements, broadcast at no charge to benefit a Denver area shelter for homeless and battered women and children. Note 1 of our rule defines "commercial matter" as "air time sold for purposes of selling a product or service." Accordingly, since you advise us that you received no valuable consideration either directly or indirectly from the advertiser (or from any of the several commercial establishments mentioned in the spot) as an inducement for airing the material, these two spots will not count as commercial matter.

The 30-second spot for the "KWGN 2 Bits Club," on the other hand, contained promotional mentions for Pizza Hut that were part of a larger sponsorship sale. Thus, KWGN exceeded the 12-minute-per-hour weekday limit of 47 C.F.R. § 73.670 by 30 seconds. You explain that this overage was due to a misunderstanding of our rule, i.e., the definition of commercial matter, which had been in effect for only two weeks. You also state that the violation was discovered and duly noted in the station's public inspection file before receipt of our letter.

It appears from your explanation that the 30-second overage on January 14, 1992, was an isolated and inadvertent violation. Accordingly, we will take no further action with respect to this matter. *See Report and Order*, 6 FCC Rcd at 2117 (discussing enforcement regarding *de minimis* violations).

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 4, 1993

Released: January 22, 1993

8310-MD
920070064

SuperStation, Inc.
Licensee, Television Station WTBS
1050 Techwood Drive, N.W.
Atlanta, GA 30318

Dear Licensee:

This is in further reference to our investigation of children's programming on Television Station WTBS, Atlanta.

We find that WTBS's broadcast of the 30-minute block of children's programming from "Tom and Jerry's Funhouse" on Tuesday afternoon, January 14, 1992, from 2:05 p.m. to 2:35 p.m. (as carried on United Artists Cable in Englewood, Colorado), violated the commercial limits imposed by our rules implementing the Children's Television Act of 1990. *See Report and Order*, 6 FCC Rcd 2111 (1991), and *Memorandum Opinion and Order*, 6 FCC Rcd 5093 (1991). Our rule allows no more than 12 minutes per hour of commercial time in weekday children's programming. 47 C.F.R. § 73.670.

As an initial matter, we accept your method of counting commercial time according to the unique WTBS "clock-hour" beginning at five minutes after the hour. We understand that for over ten years WTBS has consistently scheduled its programs, including children's shows, in this manner, and that WTBS promos as well as newspapers and television guides reflect this by indicating clear starting times, e.g., 1:05 p.m. or 2:35 p.m., for your standard hour and half-hour programs. Accordingly, to the extent the beginning and ending times are clear, and the programs conform to the standard hour or half-hour time periods, we agree that commercial minutes should be counted in WTBS children's programs according to your clock-hour beginning five minutes after the hour. Thus, the alternate counting method provided in our *Report and Order*, *supra*, at 2124 n.35, and in our *Memorandum Opinion and Order*, 6 FCC Rcd at 5096 n.40, will not apply.

Concerning the WTBS clock-hour beginning at 2:05 p.m. on Tuesday, January 14, 1992, we monitored what appeared to be 6 minutes and 15 seconds of commercial time in the children's program that ended at 2:35 p.m. You acknowledge that the 30-minute block of children's programming contained 5 minutes and 45 seconds of unmistakably commercial matter, and 30 seconds of what you had been classifying as "cross-promotional" announcements for products sold by other Turner-owned companies. You explain that because these spots were not "purchased," they were not counted as commercial time.

We have defined "commercial matter" as "air time sold for purposes of selling a product." "Sold" means "the advertiser must give some valuable consideration either directly or indirectly to the broadcaster or cablecaster as an inducement for airing the material." *Report and Order*, 6 FCC Rcd at 2112. You have not denied that WTBS (or its principals) received some valuable consideration, either directly or indirectly, for advertising the products of a related for-profit business. Thus, even if the air time was not "purchased" in the traditional sense, the subject advertisements fall within the scope of our definition. To rule otherwise would open the door to unlimited product pitches in children's programming, a result clearly contrary to the legislative intent behind the Children's Television Act of 1990.

Accordingly, the WTBS spots promoting the sale of products offered by a related business entity are to be counted as "commercial matter" for purposes of limiting advertisements in children's programming. Consequently, the 6 minutes and 15 seconds of commercial time in the subject half-hour children's program, prorated as provided in our *Report and Order*, *supra*, at 2112, and *Memorandum Opinion and Order*, *supra*, at 5095-96, exceeded the 12-minute hourly limit.

You state that, until receiving our June 16, 1992, letter of inquiry concerning the subject program, you were unaware that your cross-promotional announcements might be considered commercial matter. It thus appears that, in addition to the single violation noted above, this misunderstanding led to other violations not monitored by our field office. You have admitted that your failure to count cross-promotional announcements as commercials accounts for overages by at least three cable operators carrying Turner Network Television children's programming.

We understand that you have subsequently instituted extensive reviewing policies and have begun to count the cross-promotional material as commercial time. Under all the circumstances, we hereby ADMONISH you for the violations of our commercial limits by Television Station WTBS. This matter will be made a part of our permanent records.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

Digital Mobile Communications, Inc. File No. 316MS0003

Notice of Apparent Liability for Forfeiture Penalty for Station KQC884 in the Public Land Mobile Service at Dearborn, Michigan

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 23, 1992; Released: January 22, 1993

By the Commission:

1. On September 22, 1989, Radio Relay Corp.-Michigan (Radio Relay), now Digital Mobile Communications, Inc.-Michigan (Digital),[1] filed FCC Form 489 notifying the Commission of the construction and operation of a new location on frequency 35.58 MHz at Dearborn, Michigan. Section 22.117(b) of the Commission's Rules permits the construction and operation of additional transmitter locations without prior Commission approval provided that the reliable service area contour and the predicted interference contour of the additional transmitter are totally encompassed by existing station contours and the transmitter location is below Line A, as defined in Section 1.955 of the Commission's Rules. Section 1.955 requires frequency coordination with Canada and states that as the result of mutual agreements, the Commission has had an arrangement with the Canadian Department of Communications requiring the exchange of frequency assignment information and engineering comments on proposed assignments along the Canada-United States borders in certain frequency bands above 30 MHz and above lines A and B.

2. Digital's new transmitter location is located above Line A and therefore the construction and operation of this facility requires prior Commission approval and is not permissive within the terms of Section 22.117 of the Commission's Rules. Accordingly, notification by Form 489 is not permitted in this case.

3. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 22.3 of the Commission's Rules states:

> No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

4. Therefore, because Radio Relay did not receive prior authority before it built its facilities, an apparent violation of Section 301 of the Communications Act and Sections 22.3 and 22.117 of the Commission's Rules has occurred.

5. Section 503(b) of the Communications Act states in Pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) . . . willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for forfeiture penalty.

We find that Digital's operation is unauthorized and has been continuous since July 31, 1991, because authorization for constructing the station was never obtained by Radio Relay. Consequently, Digital's operation constitutes willful and repeated conduct within the terms of the statute.[2]

6. Pursuant to the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No.92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for operating at an unauthorized location is $40,000. Constructing and operating facilities in close proximity to the Canadian border absent prior frequency coordination with Canada cannot be deemed to be a minor violation. Moreover, there was no voluntary disclosure by Digital of its violation. Consequently, we find no adjustment factors under the *Policy Statement* present and, thus, we do not change the forfeiture amount.

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, Digital Mobile Communications, Inc.-Michigan IS APPARENTLY

---

[1] Control of Radio Relay Corp.-Michigan was transferred to BellSouth Enterprise, Inc., on July 31, 1991 and the name changed to Digital Mobile Communications, Inc.-Michigan. *See* File No. 23939-CD-TC-91, granting the transfer of control.

[2] Section 312(f)(1) of the Communications Act, which also applies to Section 503(b) (*see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991)), provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States. Section 312(f)(2) of the Communications Act provides:
>
> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.
>
> This definition applies to Section 503(b) as well. *See* H. R. Rep. No. 97-765, 97th Cong. 2nd Sess. 50-51 (1982).

LIABLE FOR A FORFEITURE in the amount of forty thousand dollars ($40,000) for willful and repeated violations of the aforementioned statutory and rule provisions. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934.

8. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this Notice, payable to the order of the Federal Communications Commission, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELAMARKETING INVESTMENTS, LTD.,
Complainant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

File No. E-91-123

ORDER

Adopted: January 13, 1993; Released: January 22, 1993

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 24, 1991, Telamarketing Investments, Ltd., (Telamarketing) filed the above-captioned complaint against Southwestern Bell Telephone Company (Southwestern Bell) seeking damages resulting from Southwestern Bell's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On January 7, 1993, Telamarketing and Southwestern Bell filed a joint motion to dismiss the complaint stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' joint motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt, Chief
Formal Complaints &
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 13, 1993

COMMENTS INVITED ON ARKANSAS PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Arkansas (Region 4).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 4 consists of the state of Arkansas. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **February 22, 1993** and reply comments on or before **March 9, 1993**. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-3 Arkansas-Public Safety Region 4**.

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

1800B3-GDG

LETTER

Released: January 11, 1993

Richard McGraw, President
McGraw Broadcasting Corporation
228 Randolph Avenue
Elkins, West Virginia 26241

In re: WOMP (AM)/WOMP-FM
Bellaire, Ohio
File Nos. BAL-920921HM,
BALH-920921HN
Applications for Voluntary
Assignment of Licenses

Dear Mr. McGraw:

This is in reference to the captioned applications for consent to assign WOMP (AM) and WOMP-FM from BTMI, Inc., Receiver to Associated WOMP, Inc., ("Associated"); your petition to deny, filed October 30, 1992; Associated's responsive opposition, filed November 5, 1992; and your Consolidated Reply to Oppositions to Petition to Deny, filed November 20, 1992.[1]

Associated is a wholly-owned subsidiary of Associated Communications Corporation, as is WSTV, Inc. ("WSTV"). WSTV is the licensee of WSTV (AM) and WRKY (FM), both stations licensed to serve Steubenville, Ohio. Since grant of the proposal would result in overlap of various principal community contours between the AM and FM stations proposed to be acquired and those owned by Associated (via its parent corporation), the assignee provided a showing in support of its claimed compliance with the Commission's revised multiple ownership rules. *See* 47 C.F.R. Sections 73.3555(a)(1)(ii) and (iii). *See also Memorandum Opinion and Order* ("*MO&O*") in MM Docket 91-140, 7 FCC Rcd 6387 (1992).[2]

The assignee claims, and our analysis confirms, that the markets created by the various principal community contour overlaps are each served by fifteen or more commercial radio stations. Given this situation, the rules now permit parties to own a maximum of 2 AM and 2 FM stations in such markets provided the commonly-owned stations do not have an audience share exceeding 25%. 47 C.F.R. Section 73.3555(a)(1)(ii). Audience share is defined as the average number of listeners to AM and FM stations "in that radio metro market or a recognized equivalent, in which a majority of the overlap between the stations in question takes place." 47 C.F.R. Section 73.3555(a)(3)(iii). If no metro market (or recognized equivalent) exists in such cases, the audience share data "is the data for all counties...within the principal community contours of the stations in question, in whole or in part." *Id.*

In this case, the overlap area within the principal community contours of the mutually overlapping contours of stations owned and proposed to be owned consists of a 1,182 square kilometer area along the common West Virginia-Ohio-Pennsylvania borders. With respect to this overlap area, 41.2% is in the Steubenville-Weirton metro market; 33.6% is in the Wheeling metro market; and 25.2% is in areas outside any metro market. *Amendment*, dated October 13, 1992. Since a majority of this overlap does not exist over any single metro market, Associated provided a county-by-county showing of the weighted audience share among the 763,900 people residing within the fourteen counties within its defined market. The weighted share, calculated pursuant to footnote 73 of the *MO&O*, for the four commonly-owned stations in this market is 11.1%, well within the 25% limit specified in Section 73.3555(a)(1)(i) of the Rules.

Your petition alleges that acquisition of WOMP "results in excessive market concentration in the Steubenville-Weirton Market," the area you argue is "the relevant market for extracting audience share data" in this case. *Petition*, at paragraph 5.[3] You indicate that the combined audience share of WSTV (AM), WRKY (FM), WOMP (AM) and WOMP (FM) in this metro market is 28.6%, thus exceeding the 25% limit stipulated in the new rules. Your petition also charges that WOMP-FM's Spring 1992 audience share figures were "artificially low" since the station was off the air from December 31, 1991 until February 6, 1992 and thereafter on-air at 75% of its licensed operational power." *Petition*, at paragraph 10. You assert that reduced operations "could have the effect of suppressing WOMP-FM's audience shares." *Id.* Finally, you argue that the Commission should defer any(grant of the referenced application until the Commission concludes its proceeding regarding the ownership interests of Mario J. Gabelli, 5.59% owner of Associated's parent company. *See Order to Show Cause* in MM Docket 92-201, 7 FCC Rcd 5594 (1992).

Associated asserts that it complies with Section 73.3555(a)(3)(iii) since the majority of the WOMP/WRKY overlap occurs outside any single metro market. *Opposition*, at page 5. The assignee states that the Spring 1992 ratings were not distorted since they were based completely upon listeners diaries returned to Arbitron during 1991, before WOMP-FM was forced off the air because of a fire. *Opposition*, at page 9. Finally, Associated argues that action on the referenced applications need not be deferred pending final disposition in the Gabelli *Order to Show Cause*

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[1] BTMI, Inc., Receiver also filed, on November 5, 1992, its opposition to your petition to deny, establishing its presence in the proceeding but noting that it relied totally on the substantive matters raised in Associated's opposition.

[2] There are two markets (as that word is defined by the *MO&O*, at 6395) in this matter: (i) that market created by the mutually-overlapping contours of WOMP (AM)--WOMP-FM--WRKY (FM) and (ii) that market created by the mutually-overlapping contours of WSTV (AM)--WRKY (FM)--WOMP-FM. As a practical matter, the analysis for determining compliance with the multiple ownership rules is the same for both markets.

[3] The Steubenville-Weirton market is comprised of three of the fourteen counties listed in Associated's county data: Jefferson County, Ohio (pop. 66,800); Hancock (pop. 29,800) and Brooke (pop. 22,700) Counties, West Virginia.

since Mr. Gabelli's interests in WSTV and WRKY do not "create a violation with regard to any of [his] other identified interests." *Opposition*, at pages 10-11.

In order to assess the merits of a petition to deny, a two-step analysis is required. Section 309(d)(1) of the Communications Act of 1934, as amended, requires that petitions to deny contain allegations that, if true, are sufficient to show that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. If so, the Commission must examine all material before it to determine whether there is a substantial and material question of fact requiring resolution in a hearing. *See Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

Your petition fails to establish a *prima facie* case. Simply stated, your allegation is based on misinterpretation of Sections 73.3555(a)(1)(ii) and 73.3555(a)(3)(iii). The former section requires that parties in markets with fifteen or more commercial radio stations provide evidence that the combined audience share will not exceed 25%. The latter section qualifies the methodology for the audience share data, basing the distinction on the percentage of principal community overlap over a recognized metro market.

As stated above, Section 73.3555(a)(3)(iii) requires audience share data for a metro market only in those situations where "a majority of the overlap between the stations in question takes place." Your interpretation of this section keys in on the noun "majority," claiming that the preferred meaning of this word (citing *Websters Ninth New Collegiate Dictionary)* is "the quality or state of being greater." The Commission did not, however, intend for this rule to treat numbers in their relationship to each other but rather numbers in their relationship to the whole. Docket 91-140 explicitly stated that audience share figures for the metro market will be required only in those instances when the contours of both stations "*are mainly located within a single metro market*" (emphasis added). *MO&O*, at 6398.

Analysis of Associated's showing reveals that the majority of the overlap area between the commonly-owned and the proposed commonly-owned stations at issue is not located over any single metro market. The largest portion of the overlap area (41.2%) is located over the Steubenville-Weirton metro market, but this still leaves 58.2% of the overlap area outside that metro market. In fact, the overlap area covers only two of the three counties that comprise the Steubenville-Weirton metro market. It further covers two of the three counties in the Wheeling metro market and two counties in neither metro market. Clearly, it would not be appropriate in this case to conclude that the stations' combined audience share in only the Steubenville-Weirton metro market is determinative.[4] Associated's use of audience data for all counties within its market therefore comports with the requirements of Section 73.3555 (a)(3)(iii). Furthermore, even assuming *arguendo* that your presumption that county-by-county data is not appropriate in situations where nearly three-fourths (74.8%) of the principal community contour overlap occur over two metro markets, our analysis of the audience shares for the two metro markets involved confirm the 22.4% weighted audience share (still below the 25% limit prescribed in our rules) as calculated by the assignee in its October 5, 1992 amendment.[5]

Your allegation that WOMP's operations at three-quarter power somehow diluted its audience share is speculative, unsupported by any evidence, and therefore fails to raise a *prima facie* case in this regard.[6] Finally, we reject your request to defer action on the proposed assignment pending resolution in the Gabelli *Order to Show Cause*. The rationale with supporting precedent for the procedural separation of Mr. Gabelli's interests and violations from pending assignment and control proceedings was thoroughly detailed in the Commission's recent refusal to defer action in the transfer of control of Secaucus, New Jersey television station WWOR. *Pinelands, Inc.*, 7 FCC Rcd 6058, 6067 (1992). Further, while the Commission did schedule a hearing in the above case to investigate questions concerning broadcast interests held by Mr. Gabelli and Gabelli Funds, that hearing was subsequently postponed to permit the parties to prepare and submit a "Memorandum of Understanding" designed to resolve the problems specified in the *Order to Show Cause*. This "Memorandum" was approved and the parties ordered to come into and remain in compliance with the appropriate rules within eight months of the finality of the *Order*. *Mario J. Gabelli*, FCC 92M-1067 (released December 4, 1992). Therefore, further action with respect to Mr. Gabelli's interest in the instant proceeding is not warranted.

Accordingly, the applicants having been found otherwise qualified, the application for consent to assign WOMP (AM)/WOMP-FM to Associated WOMP, Inc. IS HEREBY GRANTED and the petition to deny filed by McGraw Broadcasting Corporation IS HEREBY DENIED.[7]

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[4] The Commission recognized that situations will arise in certain county-by-county contexts where some counties will have audience shares above the 25% limit specified in the Rules but that this fact does not defeat a proposal and a weighted methodology should be employed. *See MO&O*, at n.73. Likewise, the fact that the overlap created in the instant case does not occur over any single metro market dictates the use of weighted audience share calculations to assess the overall impact of the proposal.

[5] Weighting the data for both metro markets is consistent with the methodology employed by the Commission for county-by-county showings. Your assertion that it is more appropriate to add the audience shares of both metro markets together, without weighting, has no basis.

[6] It is well-established that to obtain an evidentiary hearing, the proponent of a petition to deny must set forth specific allegations of fact sufficient to show *prima facie* inconsistency with the public interest, convenience and necessity. *See* 47 U.S.C. Section 309(d)(1).

[7] Five informal objections were also filed in this matter. Three (*Letters from John A. Rees, Hardees Fast Food Management, Inc., and The AWS Group, Inc.)* repeat McGraw Broadcasting's basic allegations. In light of the above actions, these objections are dismissed as moot. Two objections (*Letters from Belmont County Office of the Commissioners and Belmont County Department of Development of the Community Improvement Corporation)* expressed concern that the acquisition of WOMP AM/FM by Associated would move those stations' base of operations from Belmont County to Jefferson County where WSTV (AM) and WRKY (FM) are located with the potential for loss of jobs and other adverse economic consequences for the county. We note, however, that such an operation would be consistent with the Commission's goal to encourage joint operations pursuant to the revised ownership rules. Such operations, the Commission believes, will permit licensees to recycle the cost savings possible from combined operations into both capital improvements and better programming, benefits that clearly inure to the listening public. *Report and Order* in MM Docket 91-140, 7 FCC Rcd

Sincerely,

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

cc: Herta Suarez
Jon R. Herchenroether
Adolph W. Santorine
John Pollock
Donald R. Myers
Arthur H. Harding, Esq.

2755, 2776 (1992). In all other respects, the proposal otherwise complies with Commission rules and policies. Thus, further inquiry into this matter would not be appropriate.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
San Francisco Century
Broadcasting, L.P.
Licensee of Radio Station
KMEL(FM), San Francisco,
California

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 1993; Released: January 7, 1993

By the Commission:

1. The Commission has under consideration the *Notice of Apparent Liability to San Francisco Century Broadcasting, L.P. (KMEL(FM))*, 7 FCC Rcd 4857 (1992), and the licensee's August 21, 1992, response. The Commission issued the $25,000 Notice of Apparent Liability (NAL) to San Francisco Century Broadcasting, L.P., ("Century"), licensee of radio station KMEL(FM), San Francisco, California, for willful and repeated violations of 18 U.S.C. § 1464, prohibiting the broadcast of indecent material.[1]

2. Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act of 1934, as amended, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *See Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991)("*ACT II*"). In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)("*Pacifica*"), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and the U.S. Court of Appeals for the D.C. Circuit has upheld the Commission's authority to restrict the broadcast of indecent material when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988)("*ACT I*").

3. A complainant alleged that on various different dates between August 20 and September 16, 1991, KMEL aired indecent material on the Rick Chase Show, between the hours of 2 p.m. and 6 p.m. Based upon a tape of the broadcast, the Commission, citing four specific passages, concluded that the material aired by KMEL apparently violated 18 U.S.C. § 1464, and issued an NAL for $25,000.

4. Century contends that the broadcasts at issue consisted almost entirely of double entendre and innuendo which, Century argues, are not indecent speech. Second, Century submits that the broadcasts were not "patently offensive as measured by contemporary community standards" for the city of San Francisco. Third, Century argues that Commission sanctions are unjustified because the broadcasts were live and spontaneous. Fourth, Century points out that it exercised good faith judgment in discontinuing the "Dinner Across America" segment (which formed much of the actionable material found in the transcript to the NAL) from the "Rick Chase Show" long before the Commission issued its Notice of Apparent Liability, to avoid a recurrence of the broadcast of questionable material. Finally, Century argues for mitigation, if not recision, of the forfeiture based on Century's good faith, history of overall compliance with the Commission's indecency standard, the minor nature of the violation, its prompt remedial action, and the questions it has raised as to the applicability of the indecency standard to the broadcasts at issue.

5. We reject Century's arguments *in toto*. First, as far back as 1987, the Commission stated that innuendo may be patently offensive within the meaning of our indecency definition if it is understandable and clearly capable of a specific sexual or excretory meaning which, in context, is inescapable. *Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987), *recon.*, *Infinity Reconsideration*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom.*, *ACT I*, *supra*. Although some of the excerpts from the Rick Chase Show arguably consist of double entendre and sexual innuendo,[2] each contains language dwelling on descriptions of sexual organs and activities. Further, the language used in each passage was understandable and clearly capable of a specific sexual meaning and, because of the context, the sexual import was inescapable. *See KGB Incorporated*, 7 FCC Rcd 3207 (1992); *Narragansett Broadcasting Co. of California, Inc.*, 5 FCC Rcd 3821 (1990); *Sound Broadcasting Corporation*, 6 FCC Rcd 2174 (MMB 1991); *Great American Television and Radio Company, Inc.*, 6 FCC Rcd 3692 (MMB 1990); *WIOD, Inc.*, 6 FCC Rcd 3704 (MMB 1989)(songs and jokes containing double entendre and innuendo found indecent). Accordingly, we find Century's argument unavailing.

6. Century's second argument, that the patent offensiveness of the broadcast should be measured by San Francisco's community standards, ignores the Commission's reiteration of the indecency standard as one that is "measured by contemporary community standards for the broadcast medium."[3] The U.S. Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) and two panels of the Court of Appeals for the D.C. Circuit in *ACT I* and *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991)("*ACT II*"), have specifically upheld the Commission's generic indecency standard and its nongeographical standard. In *Infinity Broadcasting Corporation of*

[1] "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

[2] Although Century makes this argument, it fails to identify which passages it believes are purely double entendre and innuendo.

[3] Even if we were to accept this argument, Century does not provide any support to show how San Francisco's community standards differ from those for the broadcast medium generally.

Pennsylvania (Reconsideration), 3 FCC Rcd 930, 933 (1987), we stated that Commissioners would draw on their knowledge of the views of the average viewer or listener, as well as their general expertise in broadcast matters, in determining whether particular material is indecent. The *ACT I* court, in reviewing the Commission's decision in the *Infinity Reconsideration*, did not take issue with the aspect of the definition that recognized the appropriate standard as "based on a broader standard for broadcasting generally." *Infinity Reconsideration* at 933. Thus, the Commission has continued to use this standard throughout its indecency enforcement effort, and has rejected licensees' arguments that the standard should be a local one. *Sagittarius Broadcasting Corporation*, 5 FCC Rcd 7291, 7292 (MMB 1990).

7. Third, although some of the broadcasts may have occurred during live programming, the circumstances here do not warrant either mitigation or recision. The broadcasts occurred on a variety of dates and involved not just fleeting or isolated utterances, but deliberate dwelling on sexual matters. *Compare L.M. Communications*, 7 FCC Rcd 1595 (MMB 1992). Moreover, the mere fact that a show is live does not excuse a station from exercising its editorial responsibilities, especially where commonly available screening techniques can eliminate the element of surprise. *See Sound Broadcasting Corporation*, 6 FCC Rcd at 2174.

8. Finally, neither Century's purported "good faith" effort in removing the offensive segment from its programming nor its claimed history of overall compliance with the indecency statute warrants mitigation of the forfeiture. While we recognize that prompt and effective remedial action is generally a mitigating factor, *Narragansett Broadcasting Co. of California, Inc., supra*, Century has not demonstrated that it took such action in this case. Century indicates, for example, that KMEL(FM)'s general manager became aware of "the incidents shortly after their broadcast" and then discussed the matter with Rick Chase, warning him "that it could not happen again." Century then states that it subsequently removed the "program at issue" from the air to avoid again airing questionable material. It appears, however, that the "program" to which Century refers in this statement is the "Dinner Across America" segment of the "Rick Chase Show", which accounted for only a portion of the material cited in the NAL. Moreover, there is no indication of the time that elapsed between the warning to Rick Chase and the subsequent removal of the "Dinner Across America" segment. *See Guy Gannett Publishing Co.*, 5 FCC Rcd 7688 (MMB 1990); *KGB Incorporated, supra* (deficient implementation of stations' anti-indecency policies). With respect to its "overall compliance" argument, the Commission will consider the overall compliance record of all stations that a licensee owns in determining whether a reduction is warranted. *Stoner Broadcasting System, Inc.*, 7 FCC Rcd 3574 (MMB 1992). A review of the records of station KMEL, as well as those of KYBG(AM), Aurora, Colorado, KYBG-FM, Castle Rock, Colorado, and WPNT-FM, Chicago, Illinois,[4] reveals a number of violations of Commission Rules. For example, in 1992, KMEL received an admonition for an EEO violation, and KYBG-AM/FM received a Notice of Apparent Liability for a public inspection file violation.[5] We note also that in 1991, WPNT-FM received a renewal with EEO reporting conditions. While Century indicates that it has no prior indecency offenses, the downward adjustment criteria discussed in the *Policy Statement* and Section 503(b), from which they are derived, are addressed to a licensee's history of "*overall* compliance" (emphasis supplied), not its narrow record of compliance with the rule or rules whose violation prompts the pending action. *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 4700 (1991), *on recon.*, 7 FCC Rcd 5339, 5341 n.9, 5345. (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Thus, considering Century's history of overall compliance, we are not persuaded that its record for these four stations is so untarnished as to warrant a reduction of the forfeiture.

9. For these reasons, the forfeiture will be imposed for the full amount. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that San Francisco Century Broadcasting, L.P., licensee of Radio Station KMEL(FM), San Francisco, California, FORFEIT to the United States the sum of twenty-five thousand dollars ($25,000), for its violations of Section 1464 of Title 18 of the United States Code. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Attachment
cc: James R. Bayes, Esq.

Radio Station KMEL(FM), San Francisco, CA
Date/Time Broadcast: 2:00 to 6:00 p.m. August 20,21,22,23,24,26,27,29, and 30, and September 3,4,5,6,7,9,10,11,12,13,14 and 16, 1991.

Material Broadcast: Excerpts of the Rick Chase Show

RC: Rick Chase

MC: Male Caller

FC: Female Caller

AN: Announcer

SM: Allegedly the voice of KMEL's station manager (apparently Rick Chase)

[4] Commission records indicate that Century Broadcasting Corporation, the licensee of KYBG(AM) and KYBG-FM, is also the general partner of Century Chicago Broadcasting, L.P., licensee of WPNT-FM.

[5] We note that the licensee paid this forfeiture on June 22, 1992.

AN: With Rick Chase, it's time, once again, for Dinner Across America.

* *

RC: What's the last thing you had in your mouth? (Toy train whistle)

FC: (Laughs) I'm not saying.

RC: Did you have sex today?

FC: No. That's for dessert.

RC: About an hour ago you had sex, didn't you ma'am?

FC: (Laughs)

RC: Didn't 'ya. Huh?

FC: No.

RC: You had oral sex.

FC: You can't say that on the radio.

RC: I can say any damn thing I want. I can say vaginal.

FC: Huh?

RC: I can say vaginal and vaginal. (Toy train whistle)

FC: Now I know we're not on the air.

RC: (Laughs) That's the problem with Georgia. They're behind. (Toy train whistle) They're afraid to speak their mind in Georgia. I'm not. (Toy train whistle)

FC: 'Cause I'm not a Georgian, I'm a Californian.

RC: Crap ma'am. Who do you think wrote this letter?

* *

RC: KMEL.

FC: Yes, I'd like to talk to your station manager.

RC: About what?

FC: I don't know, but I would like to talk to him.

RC: OK, I'll be right back. I'll put him on, OK?

FC: I really want him.

RC: OK.H&SM: Hello, this is Lloyd Kramer(?) [apparently Rick Chase impersonating the station manager, allegedly named Lloyd Kramer].

FC: I don't know if this is [nervous laugh], you know.

RC: Uh, yes ma'am, this is Lloyd Kramer, Can I help you?

FC: OK. I want to tell you that I was totally offended by whatever disc jockey was on just now. What is it, Rick, uh, whatever. I don't know who it was.

SM: Uh, what seems to be the problem, ma'am?

FC: OK, they were doing that dinner across the United States.

SM: Yes ma'am.

FC: OK. Did you hear that segment he just did with that poor girl fromGeorgia?

SM: Yes we did ma'am. FC: OK. Do you have... I hope you've gotten more complaints than just mine.

SM: Uh, you're the first one to complain, ma'am.

FC: Well, I'll tell you I not only was offended and it's not just the sexual explicit, you know, language.

SM: Well, well, what exactly did he say that offended you, ma'am?

FC: OK. Number one, the fact that you're dealing with children who are watching this...

SM: Hold it ma'am. What exactly did he say that offended you, though?

FC: OK. Number one, he offended me, the fact that he used the term "oral sex," what did you have in your mouth, what was the last thing that you had in your mouth.

SM: Uh, what, uh, what was the last time you had oral sex, ma'am?

FC: Excuse me! I am not. I know I'm not talking to the station manager.

SM: Have you ever had oral sex ma'am?

FC: Excuse me, you are so rude (Unintelligible).

SM: Have you (unintelligible). Do you, do you, do you have a problem having oral sex?

FC: (Unintelligible) You can't believe what I'm listening to here.

RC: Maybe you're too ugly to have oral sex. ("Looney Tunes" Music) See you later ma'am. And remember, everybody does it. Why be embarrassed about it. (Music)

* *

Male duet(MD) singing:

MD: You gotta blow me, hey, you hardly even know me, just set yourself below me and blow me tonight. Hey, A handy would certainly be dandy, certainly be dandy, but it's not enough to blow, hey, you gotta blow me, all night. (Looney Tunes music)

RC: There's only one Rick Chase, thank God for that.

* *

Duet singing with chorus backing up lyrics

Blow me, you hardly even know me, just set yourself below me and blow me, tonight. Hey, a handy would certainly be dandy, but it's not enough to slow (?)(Unintelligible) me, hey, you gotta blow me all night. Hey, when you part your lips that way, I want you night and day, when you squeeze my balls so tight, I want to blow my love, hey, with all my might. So blow me, you hardly even know me, know me, just set yourself below me, you gotta blow me, tonight. Come on everybody. Blow me, blow me, you hardly even know me, you hardly even know me, so blow me, you gotta blow me, hey, so blow me, blow me tonight.

* *

MC: Hey could you play me "The Candy Man" 'cause I'm going to be knocking boots this whole weekend?

RC: Okay. With who?

MC: I don't know. It's a blind date so I hope everything is going to go well.

RC: It's a blind date and you're already expecting sex on the first time.

MC: Hey, you know. (Unintelligible), this is me you're talking to Rick. (Laughs)

RC: How many diseases...

MC: A little dinner, a little wine, what more could she ask for? You know what I mean?

RC: How many diseases do you have, sir?

MC: Aw, come on Rick, don't be like that.

RC: Got a big canker sore down there on Mister Winkie?

MC: Oh Rick, what are you doing? Don't be like that to me. You gotta...

RC: What's your first name?

MC: You gotta wish me luck.

RC: What. What's your name sir?

MC: My name's Al.

RC: Al.

MC: Yeah.

RC: Don't go out with Al, he's got a canker sore on Mister Winkie.

MC: Don't say that Rick.

RC: He's got diseases. He's not safe.

MC: Come on Rick.

RC: He might be good in bed but watch out a year later.

MC: Don't do that to me Rick.

RC: Canker sore on Mister Winkie.

MC: Don't do that to me, Rick.

RC: Put it back in your pants or wash it or something.

MC: Come on Rick, don't do that to me.

RC: Goodbye, have a great time. Feel sorry for the lady.

* *

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SUNDE CELLULAR COMMUNICATIONS, INC. File No. 10361-CL-P-403-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A in Market 403, Indiana 1 (Newton)

MOBILE TELETALK GROUP File No. 11016-CL-P-458-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A in Market 458, Louisiana 5 (Beauregard)

WALKER PARTNERSHIP File No. 10365-CL-P-545-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A in Market 545, Nevada 3 (Storey)

NATIONAL CELLULAR PARTNERS File No. 10358-CL-P-675-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A in Market 675, Utah 3 (Juab)

PC CELLULAR, INC. File No. 11015-CL-P-440-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A in Market 440, Kansas 13 (Edwards)

JAMES E. MARTIN, JR. File No. 11023-CL-P-659-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A in Market 659, Texas 8 (Gaines)

AAT RSA COMPANY, L.P. File No. 11012-CL-P-313-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A in Market 313, Alabama 7 (Butler)

PERCIVAL VAZ File No. 10357-CL-P-319-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A in Market 319, Arizona 2 (Coconino)

RSA CELLULAR COMPANY File No. 11017-CL-P-460-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A in Market 460, Louisiana 7 (West Feliciana)

MICHAEL B. AZEEZ File No. 10359-CL-P-634-A-88

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A in Market 634, South Dakota 1 (Harding)

LARSEN CELLULAR ASSOCIATES File No. 11014-CL-P-366-A-89

For facilities in the Domestic Public Cellular Radio Service on Frequency Block A in Market 366, Florida 7 (Hamilton)

MEMORANDUM OPINION AND ORDER

Adopted: January 8, 1993; Released: January 8, 1993

By the Chief, Mobile Services Division:

I. BACKGROUND

1. On April 8, 1992, the Commission conducted "relotteries" of the above-captioned Rural Service Area (RSA) non-wireline cellular markets after the Mobile Services Division (MSD) dismissed the applications of the previous lottery winners[1] as unacceptable for filing under the alien restrictions of Section 310(b) of the Communications Act

[1] Delta Cellular Partners, Federal Mobile Radio, Eastern Cellular Systems, CGSA Telephones, Cellswitch, Continental Electronics, U.S. RSA Telco Partners, Quadrangle Communications, and Cells Company were the previous lottery winners and tentative selectees in markets 313A, 319A, 440A, 458A, 460A, 545A, 634A, 659A, and 366A, respectively. 21st Century Telecom G.P. was the previous lottery winner and tentative selectee in markets 403A and 675A.

of 1934, as amended (Act).[2] Sunde Cellular Communications, Inc. (Sunde), Mobile Teletalk Group (Mobile), Walker Partnership (Walker), National Cellular Partners (National), PC Cellular, Inc. (PC), James E. Martin, Jr. (Martin), AAT RSA Company, L.P. (AAT), Percival Vaz (Vaz), RSA Cellular Company (RSA Cellular), Michael B. Azeez (Azeez), and Larsen Cellular Associates (Larsen) were selected as the relottery winners and announced as the tentative selectees in markets 403A, 458A, 545A, 675A, 440A, 659A, 313A, 319A, 460A, 634A, and 366A, respectively.[3]

2. Federal Mobile Radio L.P. (Federal), Eastern Cellular Telephone L.P. (Eastern), CGSA Telephones L.P. (CGSA L.P.), 21st Century Telecom L.P. (21st Century), Delta Cellular Partners (Delta), Cellswitch L.P., Continental Electronics L.P. (Continental), U.S. RSA Telco Partners L.P. (U.S. RSA), Quadrangle Communications (Quadrangle), and Cells Company L.P. (Cells) (collectively, petitioners) filed petitions requesting the imposition of various conditions upon any grants of the relottery winners' applications (condition request).[4] Delta and Cellswitch L.P. also submitted petitions to deny AAT and RSA Cellular's applications, respectively (petitions). Responsive pleadings were filed.[5] For the following reasons, we deny petitioners' condition request, as well as Delta and Cellswitch L.P.'s petitions. Accordingly, we grant Sunde, Mobile, Walker, PC, Martin, AAT, Vaz, RSA Cellular, Azeez, and Larsen's applications subject to the Commission's statement in the lottery notice announcing the relotteries.[6] *See Lottery Notice*, Mimeo No. 21449 (released Jan. 29, 1992) (*Lottery Notice*).[7]

II. PLEADINGS; DISCUSSION

3. Some of the petitioners request that any authorizations issued to the relottery winners be conditioned on their "acknowledg[ing] and agree[ing]" that the authorizations are conditioned on the outcome of the appeal of *Continental* (*see supra* note 2). Cellswitch L.P., Quadrangle, Federal, Eastern, Delta, Cells, and U.S. RSA Requests at 4. Sunde, Walker, National, PC, Vaz, Larsen, and AAT contend that this condition is unnecessary under the *Lottery Notice* and the law. In the *Lottery Notice*, the Commission stated that authorizations granted in connection with the relotteries "will be conditioned upon the Commission's dismissal action becoming final and no longer subject to judicial review." *See Lottery Notice* at 2. In compliance with the Commission's statement, we will expressly condition grants of the relottery winners' applications upon the outcome of any pending proceedings regarding the dismissal of applications filed by the previous lottery winners.[8] An authorization subject to such conditioning language constitutes the holder's acknowledgment and agreement that the grant is subject to the outcome of the appeal. Therefore, the petitioners' requested condition, involving some acknowledgement or agreement by the relottery winners, is unnecessary and we reject it.

4. Also, the petitioners request that any authorizations issued to the second lottery winners be subject to the condition that in the event the United States Court of Appeals for the District of Columbia Circuit reverses *Continental* and remands the petitioners' applications to the Commission, the second lottery winners' authorizations must be automatically terminated and the underlying applications must be returned to their respective lottery pools pending the disposition of the petitioners' applications on remand. In addition, the petitioners request that the authorizations be subject to the condition that if the Commission ultimately dismisses the petitioners' applications on remand, the second lottery winners' applications are prohibited from receiving any preference in subsequent relotteries.

5. The petitioners contend that these conditions are necessary because if the petitioners are successful on appeal, their applications are required to be returned to the *status quo ante* at the Commission under *Getty v. Federal Sav. and Loan Ins. Corp.*, 805 F.2d 1050 (D.C. Cir. 1986). Further, some of the petitioners claim that these conditions are necessary because the Commission, when "[f]aced with a possible embedded investment by the second winner . . . . could hardly be expected to give impartial consideration to Petitioners' applications." 21st Century, CGSA L.P., and Continental Joint Petition at 3. Walker, National, Sunde, PC, AAT, Paz, and Martin assert that the proposed conditions would be anticompetitive, would disrupt cellular service, and would cause unnecessary expenditures of Commission resources. Larsen avers that the proposed conditions fail to take into consideration the public interest. Our processing of the petitioners' applications in the event of a remand will be determined in large part by the terms

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[2] The Commission upheld the dismissals in *Continental Cellular*, 6 FCC Rcd 6834, *Erratum*, 6 FCC Rcd 7205 (1991) (*Continental*). The petitioners (identified *infra*) have appealed the Commission's decision. *See Moving Phones Partnership L.P. v. FCC*, D.C. Cir. Case No. 91-1611 (Dec. 18, 1991), *pending* (appeal).

[3] *See Public Notice*, Report No. CL-92-101 (released June 12, 1992) (Common Carrier Bureau announces the relottery winners as tentative selectees for their respective markets).

[4] In an Order, we denied the petitioners' request to stay the relotteries. *See Cells Company L.P.*, 7 FCC Rcd 2143 (Mobile Serv. Div. 1992).

[5] 21st Century claims that Sunde's opposition, filed on August 28, 1992, is untimely under Section 1.45 of the Rules. Section 1.45(a) of the Rules provides that "[o]ppositions to any motion, petition, or request may be filed within 10 days after the original pleading is filed." 21st Century filed its request on July 29, 1992; therefore, Sunde's opposition is untimely under Section 1.45. However, because of the nature of the arguments involved, we have considered Sunde's opposition."

[6] We have not received the Federal Aviation Administration's final determinations regarding National's proposed antenna structures. Therefore, we do not grant National's application in this Order.

[7] Sunde, RSA Cellular, and Vaz contend that 21st Century, CSGA L.P., Continental, Cellswitch L.P., and Federal's requests are untimely petitions for reconsideration of the *Lottery Notice*. *See* 47 U.S.C. Section 405(a) (petitions for reconsideration "must be filed within thirty days from the date upon which public notice is given of the . . . action complained of."). We agree with 21st Century's assertion that the requests do not constitute petitions for reconsideration of the *Lottery Notice* but, instead, are proposals for the specific language to implement the Commission's statement that "[a]uthorizations granted after these new lotteries are held will be conditioned upon the Commission's dismissal action becoming final and no longer subject to judicial review." *Lottery Notice* at 2. Therefore, we reject the relottery winners' contention.

[8] We note, however, that imposition of this conditioning language is not necessary under the law. *See, e.g., Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976) (*Alianza*) (*see infra* para. 6).

of the remand order. Until we receive a remand order, it is premature and inappropriate for us to consider acting on petitioners' request.

6. In addition, 21st Century, CGSA L.P., and Continental request imposition of a condition on the authorizations barring construction of the proposed systems until the resolution of petitioners' appeal "to prevent any prejudice to Petitioners arising from the potential embedded investment in the market . . . ." 21st Century and Continental Reply to Walker and National Opposition at 4 n.2; and 21st Century Reply to Sunde Opposition at 7 n.5. Similarly, Delta and Cellswitch L.P. contend that a grant of AAT and RSA Cellular's applications may impede an objective review of Delta and Cellswitch L.P.'s applications in the event of a remand. Therefore, they request that the Commission deny AAT and RSA Cellular's applications and conduct another lottery only if the appeal results in the dismissal of Delta and Cellswitch L.P.'s applications. The courts have recognized that license grants which are challenged by litigation are subject to that litigation and may be undone if the basis of the grant is reversed as a result of the outcome of the litigation. *See, e.g., Alianza* at 736. Therefore, there is no basis for the petitioners' contentions that we would be unable to provide them with adequate relief should they ultimately prevail on the merits. Accordingly, we reject the petitioners' request and Delta and Cellswitch's petitions.

7. Walker requests an eighteen-month extension of the Section 22.43(c) deadlines to construct the proposed facilities[9] because "the available financing necessary to achieve the level of investment needed for these systems is directly dependent upon the certainty that the parties will be permitted to retain the subject authorizations." Walker Opposition at 6. Walker avers that because "the pending appeals erode the banking community's confidence in the grants . . . .[,] an extension would give [it] . . . the flexibility to delay making some of the more substantial and riskier financial investments." *Id.* Similarly, Sunde and RSA Cellular request an extension of the construction period until "eighteen months following final disposition of initial selectee's appeal . . . . [because] it would be inappropriate for the Commission to impose a rigid requirement to construct within a fixed time frame, unless the licensee would have unconditional rights to the authorization well before expiration of the deadline." Sunde and RSA Cellular Oppositions at 7-8. Section 22.43(b) of the Rules provides that an extension of time to complete construction

> will be granted only if the licensee shows that the failure to complete construction is due to causes beyond his control. No extensions will be granted for delays caused by lack of financing . . . or for failure to timely order equipment.

Section 22.43(c) of the Rules was adopted "to ensure that cellular permittees, selected by lottery, proceed expeditiously to construct authorized systems[,] . . . to facilitate the provision of cellular service to the public[, and] . . . . to screen out speculative, insincere applicants." *Amendment of the Commission's Rules to Reduce the Construction Period for Cellular Communications Systems, Report and Order*, 60 Rad.Reg.2d 1311, 1312 (1986). The possibility that the appeal of *Continental* may make it more difficult for the relottery winners to obtain financing and take other steps to comply with the construction deadlines will not support a request for an extension of the construction deadlines under Section 22.43(b) of the Rules.[10] Moreover, when the relottery winners participated in the relottery, they were on notice that any subsequent grants would be conditioned on the outcome of the appeal. *See supra* para. 3. Most importantly, an extension of the construction deadlines would delay provision of service to the public and thereby frustrate the underlying purposes of Section 22.43(c). Therefore, we find that Walker, Sunde, and RSA Cellular have submitted insufficient evidence or justification to support their requests for an extension of the construction deadlines under Section 22.43(b) of the Rules, and accordingly, we reject their requests.

8. We find that AAT,[11] RSA Cellular, Sunde, Mobile, Walker, PC, Martin, Vaz, Larsen, and Azeez are qualified to be Commission licensees, that their applications comply

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[9] Section 22.43(c)(1) of the Rules provides that "[c]ellular base stations . . . shall be completed and the station ready for operation within 36 months from the date the radio station authorization is granted."; Section 22.43(c)(2) of the Rules provides that "[f]or systems beyond the top-90 markets [which include the instant markets], construction of an initial phase of the system . . . must be completed . . . within 18 months from the date the radio station authorization is granted."

[10] *See, e.g., National Beeper, Inc.*, 7 FCC Rcd 3202 (Com.Car.Bur. 1992), *appeal pending* ("While externalities such as market financing conditions may increase the financial burden on a grantee, they do not excuse failure to construct or operate due to lack of funding.").

[11] AAT requests a waiver of Section 22.922 of the Rules, asserting that on August 31, 1990, a 15 percent shareholder in AAT Communications Corporation (ACC), the corporate general partner in AAT, exercised his option to acquire another shareholder's 20 percent interest in ACC in connection with the latter shareholder's retirement from ACC. *See* AAT Amendment to Application, Revised Exhibit 1, Attachment B at 1, 2 (dated May 11, 1992); *see also id.* ("The control of . . . [AAT and ACC] remain unchanged."); *see also* AAT Statement of Amendment at 1 n.1 (the option was acquired by the shareholder on January 29, 1988). Section 22.922 prohibits alienation of interests in cellular applications prior to the grant of a construction authorization. The Commission adopted Section 22.922 to minimize speculation in RSA applications and to eliminate any unnecessary delays in the implementation of service to the public. *See Amendment of the Commission's Rules for Rural Cellular Service, Third Report and Order*, 64 Rad.Reg.2d 1382 (1988). We find that the instant option arrangement involves a transaction unrelated to the filing of cellular applications and that a waiver would not delay the processing cycle. Therefore, we find that this is not the type of transaction which the Commission intended to prevent when it adopted Section 22.922 of the Rules. Accordingly, we waive the provisions of Section 22.922 and, therefore, grant AAT's request. *See Cellular U.S.A., Inc.*, 4 FCC Rcd 5586 (Mobile Serv. Div. 1989) (waiver granted for redistribution of a small percentage of stock from one shareholder to another); *see also Wilcom Cellular Corporation*, 4 FCC Rcd 6130 (Mobile Serv. Div. 1989).

Also, RSA Cellular requests a waiver of the anti-alienation provisions of Section 22.922. It states that, since originally filing its application, J.C. Golden, a 6.34 percent initial shareholder in RSA Cellular, has died and now "Guy Golden . . . claims to hold" J.C. Golden's shares. RSA amendment to application at 1 (dated Aug. 3, 1992); *see also id.* at 2 ("The reissuance of the certificates has not been made . . ., so the original stock records

fully with the Act and the Rules, and that a grant of their applications would be in the public interest under Section 309 of the Act.

III. ORDERING CLAUSES

9. IT IS ORDERED that the petitions filed by Federal Mobile Radio L.P., Eastern Cellular Telephone L.P., CGSA Telephones L.P., 21st Century Telecom L.P., Delta Cellular Partners, Cellswitch L.P., Continental Electronics L.P., U.S. RSA Telco Partners L.P., Cells Company L.P., and Quadrangle Communications requesting imposition of conditions on the grants of Sunde Cellular Communications, Inc., Mobile Teletalk Group, Walker Partnership, National Cellular Partners, PC Cellular, Inc., James E. Martin, Jr., AAT RSA Company, L.P., Percival Vaz, RSA Cellular Company, Larsen Cellular Associates, and Michael B. Azeez's applications ARE DENIED.

10. IT IS FURTHER ORDERED that the petitions to deny filed by Delta Cellular Partners and Cellswitch L.P., against applications filed by AAT RSA Company, L.P., and RSA Cellular Company, ARE DENIED.

11. IT IS FURTHER ORDERED that the applications of Sunde Cellular Communications, Inc., Mobile Teletalk Group, Walker Partnership, PC Cellular, Inc., James E. Martin, Jr., AAT RSA Company, L.P., Percival Vaz, RSA Cellular Company, Larsen Cellular Associates, and Michael B. Azeez ARE GRANTED, conditioned upon the outcome of any pending proceedings regarding the dismissal of applications filed by Delta Cellular Partners, Federal Mobile Radio, Eastern Cellular Systems, CGSA Telephones, Cellswitch, Continental Electronics, U.S. RSA Telco Partners, and Cells Company for Rural Service Area cellular markets 313A, 319A, 440A, 458A, 460A, 545A, 634A, 659A, and 366A, respectively, and 21st Century Telecom G.P. for Rural Service Area market 403A.

12. IT IS FURTHER ORDERED that Sunde Cellular Communications, Inc., Mobile Teletalk Group, Walker Partnership, PC Cellular, Inc., James E. Martin, Jr., AAT RSA Company, L.P., Percival Vaz, RSA Cellular Company, Larsen Cellular Associates, and Michael B. Azeez are on notice that their authorizations do not include the right to any interference protection in any areas outside their respective Rural Service Areas and are conditioned upon coordinating with the current or future co-channel licensees in the areas outside their respective Rural Service Areas. Further, they are on notice that in the event current or future Metropolitan Statistical Area/Rural Service Area licensees encounter interference from any service extension, they will have to change frequencies in those cells or reduce their effective radiated power or antenna height as necessary to eliminate any interference due to an extension.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

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still show J.C.[.]"). For the same reasons set forth above, we waive the provisions of Section 22.922 and, therefore, grant RSA Cellular's request.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 11, 1993

INDUSTRY BULLETIN

TELEPHONE CONSUMER PROTECTION ACT

TELEPHONE SOLICITATIONS, AUTODIALED AND ARTIFICIAL OR PRERECORDED VOICE MESSAGE TELEPHONE CALLS, AND THE USE OF FACSIMILE MACHINES

The Telephone Consumer Protection Act (TCPA) is a federal statute that was enacted on December 20, 1991, to address concerns about the growing volume of unsolicited telephone marketing calls and the increasing use of automated and prerecorded telephone calls. The TCPA imposes restrictions on the use of automatic telephone dialing systems ("autodialers"), artificial or prerecorded voice messages, and telephone facsimile machines to send unsolicited advertisements. The TCPA also directs the FCC to adopt regulations to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object.

The FCC adopted rules and regulations, effective December 20, 1992, implementing the TCPA.[1] The FCC will be monitoring complaints about automated calls and unwanted telephone solicitations to determine whether additional action to limit or to prohibit such calls would be appropriate.

Different rules and regulations apply to calls placed to residences and calls placed to businesses. Therefore, you should carefully read this entire bulletin which is intended to assist your organization in complying with the TCPA and the FCC's rules and regulations.

HOW IS THE TERM "TELEPHONE SOLICITATION" DEFINED?

The term "telephone solicitation" is defined as the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person. The term does not include a call or message (1) to any person with that person's prior express invitation or permission, (2) to any person with whom the caller has an established business relationship, or (3) by a tax-exempt nonprofit organization.

WHAT IS AN "ESTABLISHED BUSINESS RELATIONSHIP?"

You have an "established business relationship" with a residential subscriber if the subscriber has made an inquiry, application, purchase or transaction with respect to your business' products or services. An established business relationship cannot be formed solely on the basis of a prior solicitation. A residential subscriber can end an established business relationship by stating that he or she does not want to receive any more calls or solicitations from your business.

HOW IS THE TERM "AUTODIALER" DEFINED?

An "autodialer" is defined as equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator.

WHAT RESTRICTIONS APPLY TO THE USE OF AUTODIALERS OR ARTIFICIAL OR PRERECORDED VOICE MESSAGES?

1) Except in emergencies or with the called party's prior express consent, autodialers or artificial or prerecorded voice message devices may not be used to call:

* emergency telephone lines, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency
* guest or patient rooms of a hospital, health care facility, elderly home, or similar establishment
* paging and cellular telephone numbers or other radio common carrier services (cellular service providers may send prerecorded messages to their subscribers -- for example to "roamers" leaving the service area -- if subscribers are not charged for the call) any service for which the called party is charged for the call.

2) Except in emergencies or with the called party's prior express consent, artificial or prerecorded voice message telephone calls may not be placed to residential subscribers.

A call is exempt from this prohibition if the call:

* is not made for a commercial purpose
* is made for a commercial purpose but does not include an unsolicited advertisement
* is made by a caller with whom the called party has an established business relationship
* is made by or on behalf of a tax-exempt nonprofit organization.

3) Artificial and prerecorded voice message telephone calls placed to business numbers are not prohibited.

[1] On December 18, 1992, the United States District Court for the District of Oregon issued a preliminary injunction enjoining the Commission from enforcing §227 (b) (1) (B) of the Telephone Consumer Protection Act of 1991 pending judicial action on a lawsuit challenging the constitutionality of that section (§227 (b) (1) (B) prohibits calls using artificial or prerecorded messages to residential telephone subscribers). The injunction applies nationwide, and affects only FCC enforcement of §227 (b) (1) (B).

4) No person may use an autodialer in a way that simultaneously engages two or more lines of a multi-line business.

5) Any person, business, or entity using an autodialer to transmit an artificial or prerecorded voice message, including such calls placed to business numbers, must clearly state its identity at the beginning of the message, and must clearly state its telephone number or address during or after the message. The telephone number provided cannot be the number of the autodialer or prerecorded message player which placed the call.

DID THE FCC ADOPT SPECIAL RULES FOR PRERECORDED DEBT COLLECTION CALLS PLACED TO RESIDENCES?

No. The FCC did not find it necessary to adopt specific rules for debt collection calls. Debt collectors are reminded that the Fair Debt Collection Practices Act also applies to debt collection calls. That Act is enforced by the Federal Trade Commission.

WHAT RULES APPLY TO "LIVE" SOLICITATIONS PLACED TO RESIDENTIAL TELEPHONE SUBSCRIBERS?

1) "Live" telephone solicitations may not be made to residential subscribers before 8 A.M. or after 9 P.M. (local time at the called party's location).

2) Persons or businesses making "live" telephone solicitations to residential telephone subscribers must:

* institute procedures for maintaining a list of persons who do not wish to receive telephone solicitations (a "do-not-call list") *before* initiating any telephone solicitations

* have a written policy, available upon demand, for maintaining a do-not-call list

* train and inform personnel engaged in any aspect of telephone solicitation in the existence and use of the do-not-call list

* make a record of the name and telephone number of residential subscribers who request not to be called again, at the time the request is made

Requests should be forwarded to the person or entity on whose behalf the solicitation is made (where appropriate), to the party maintaining the do-not-call list (if not maintained by the caller), and to affiliated entities (where appropriate)

* maintain the do-not-call list *indefinitely* for the purpose of future telephone solicitations

* obtain a residential subscriber's prior express consent to share or to forward the residential subscriber's request not to be called to a party other than the entity on whose behalf a solicitation is made or its affiliate

* place the residential subscriber's name and number on the do-not-call list of any affiliates or subsidiaries of the telemarketer where the residential subscriber would reasonably expect to be included on their lists given the identity of the telemarketer and the product being advertised

* provide the called party with the name of the individual caller, the person or entity on whose behalf the call is made, and a telephone number or address at which that person or entity may be contacted.

3) The party on whose behalf a solicitation is made will ultimately be held liable for violations of the TCPA or FCC rules.

4) FCC rules do not require tax-exempt nonprofit organizations to comply with rules for making telephone solicitations.

DO THE "DO-NOT-CALL LIST" RULES APPLY TO CALLS PLACED TO BUSINESS TELEPHONE NUMBERS?

No. However, state laws may apply to calls placed within the same state.

ARE SMALL BUSINESSES OR SECOND-CLASS MAIL PERMIT HOLDERS EXEMPT FROM FCC RULES ON TELEPHONE SOLICITATIONS?

No.

DO FCC RULES BAN UNSOLICITED ADVERTISEMENTS TO TELEPHONE FACSIMILE MACHINES?

Yes. Effective December 20, 1992, FCC rules ban the transmission of unsolicited advertisements to telephone facsimile machines. An "unsolicited advertisement" is defined as a transmission advertising the commercial availability or quality of property, goods or services without the prior express invitation or permission of the person or entity receiving the transmission.

Unsolicited advertisements may not be transmitted by any device to a telephone facsimile machine unless the person receiving the facsimile has given prior express invitation or permission to receive it. If the sender and the recipient have an established business relationship, an invitation or permission to receive unsolicited facsimile advertisements is presumed to exist. However, the recipient may end an established business relationship by requesting that no further unsolicited advertisements be sent, thus revoking any invitation or permission to receive further transmissions.

WHAT OTHER REQUIREMENTS APPLY TO THE USE OR MANUFACTURE OF TELEPHONE FACSIMILE MACHINES?

FCC rules require that each transmission to a telephone facsimile machine must clearly contain, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, (1) the date and time the transmission is sent (2) the identity of the sender and (3) the telephone number of the sender or of the sending machine.

All telephone facsimile machines manufactured on or after December 20, 1992 must have the capacity to clearly mark such identifying information on the first page or on each page of the transmission.

WHO IS RESPONSIBLE FOR COMPLIANCE WITH FCC RULES ON TELEPHONE FACSIMILE TRANSMISSIONS?

The person on whose behalf a facsimile transmission is sent will ultimately be held liable for violations of the TCPA or FCC rules.

DO THE TCPA AND THE FCC'S RULES PREEMPT STATE LAW?

The TCPA specifically preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or automated artificial or prerecorded voice messages.

The TCPA and the FCC's rules do not preempt state law which imposes more restrictive requirements or regulations for (1) the use of facsimile machines or other electronic devices to send unsolicited advertisements, (2) the use of autodialers, (3) the use of artificial or prerecorded voice messages, or (4) the making of telephone solicitations.

Thus, depending on state law, the TCPA, the FCC's rules and/or state laws could apply to your company's services. You should contact the state public utilities commission in each state where your company provides the services listed in the previous paragraph to determine what laws apply in those states.

WHAT REQUIREMENTS APPLY TO RELEASING AUTODIALED CALLS?

Autodialers used to transmit artificial or prerecorded voice messages should automatically release the called party's line within 5 seconds of the time that the called party's hang-up signal reaches the dialing system of the caller.

WHO RESOLVES DISPUTES INVOLVING VIOLATIONS OF THE TCPA AND THE FCC'S RULES?

1) Residential subscribers who receive telephone solicitations after requesting not to be called may directly contact the business placing the call using the telephone number or address provided in the solicitation.

2) The TCPA provides a person or entity with a private right of action, if permitted by state law or court rules, for any violation of the' autodialer or prerecorded voice message prohibitions, for any violation of the unsolicited advertisement facsimile prohibition, and for any violation of the guidelines for solicitations. A person or entity may file suit to enjoin the violations listed below and/or file suit for actual monetary loss from violations or receive $500 in damages for each violation (whichever is greater). In some instances the court may triple the award. Suit may be filed when the TCPA is violated, such as when:

* residential customers receive more than one "live" call within any 12 month period by or on behalf of the same company after making a do-not-call request (defendants that have established procedures to comply with rules regarding telephone solicitation may present such compliance efforts as an affirmative defense to any action brought against them)

* anyone receives an autodialed or artificial or prerecorded voice message call in violation of the TCPA and the FCC's rules

* an autodialer simultaneously engages two or more lines of a multi-line business

* anyone receives an unsolicited advertisement on their facsimile machine in violation of the TCPA and the FCC's rules.

3) A state may initiate and file a civil action on behalf of its residents in federal district court against any person or entity it believes is engaged in a pattern or practice of violations of the TCPA or FCC rules. States retain the power to initiate action in state N Tcourt for violations of state telemarketing statutes.

4) Persons who suspect violations of the TCPA or the FCC's rules may request FCC action. The FCC may assess penalties against parties who violate the TCPA or the FCC's rules and regulations.

WHERE CAN I ORDER A COMPLETE COPY OF THE TCPA AND THE FCC'S ORDER EXPLAINING IMPLEMENTATION OF THAT ACT?

Copies can be ordered from the FCC's contractor for public records duplication: Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036 (telephone: (202) 452-1422). You should ask for copies of the Telephone Consumer Protection Act and the Report and Order in CC Docket No. 92-90 released by the Commission on October 16, 1992 (In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released January 7, 1993

MOTION FILED TO AMEND OR REPEAL RULE 68.213 WITH REFERENCE TO INSIDE WIRING IN HIGH RISE MULTI-TENANT BUILDINGS (CC DOCKET NO. 88-57, RM-5643)

On October 13, 1992 the Building Owners and Managers Association of Pittsburgh, Inc. (BOMA) filed a pleading entitled: "Petition to Intervene in Rule Making Proceedings and (2) For a Declaratory Judgment that Rule 68.213 Does not Apply to Inside Wiring in High Rise Multi-Tenant Buildings, or (3) For the Amendment or Repeal of FCC Rule 68.213." (petition).

Copies of the petition, and comments when filed, may be inspected and copied at the Commission's Reference Center, Room 239, 1919 M St., N.W., Washington, D.C from 9:00 a.m. to 4:30 p.m. Copies are also available from the Downtown Copy Center, 1919 M St., N.W., Washington, D.C. (202) 659-8657. **Comments regarding the BOMA petition may be filed on or before February 12, 1993. Reply Comments are due by March 1, 1993**. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202)632-7000. For further information contact Olga Madruga-Forti (202)634-1832.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-266

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

NOTICE OF PROPOSED RULEMAKING

Adopted: December 10, 1992; Released: December 24, 1992

Comment Date: January 27, 1993
Reply Comment Date: February 11, 1993

By the Commission:

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I. INTRODUCTION

1. In this Notice of Proposed Rule Making (NPRM) we propose to amend our rules to implement Sections 623, 612, and 622(c), of the Communications Act of 1934, as amended[1] by the Cable Television Consumer Protection

[1] 47 U.S.C. Sections 543, 532, and 542(c).

and Competition Act of 1992 ("Cable Act of 1992").[2] These statutory provisions concern regulation of rates for cable service and for leased commercial access.

2. We solicit comment to help us craft a comprehensive regulatory model that will best fulfill statutory objectives related to rate regulation for the cable industry. Section II of this NPRM describes and proposes alternative procedural and substantive regulations through which the requirements of these statutory provisions could be implemented. It also discusses the advantages and disadvantages of each alternative. We tentatively conclude that we should not select cost-of-service regulation as the primary mode of regulation of cable service rates. Later, we initially find that we should adopt a benchmark regulatory alternative for regulation of cable service rates under which the Commission would establish a benchmark rate, or a simple formula which could be used to derive such a rate. Rates above the benchmark would be presumed unreasonable. At the same time, cost-of-service regulation on an individual system basis could be applied to cable systems seeking to justify a rate above the benchmark. We also solicit comment generally on how the different rate regulation proposals presented here would affect, and be affected by, other parts of the Cable Act of 1992 addressed in separate Commission proceedings.[3]

II. PROPOSED IMPLEMENTATION

A. Regulation of Cable Service Rates

1. General Issues

3. The Cable Act of 1992 directs the Commission to establish rules to govern rate regulation of cable service tiers offered by cable systems not subject to effective competition.[4] The Commission must establish, first, regulations that assure that rates for the basic service tier are reasonable, and, second, standards that permit identification, in individual cases, of rates for cable programming services that are unreasonable.[5] In this section, we propose regulatory alternatives to give effect to the specific obligations and prohibitions the Act imposes on regulators and cable operators as part of its statutory scheme for rate regulation of the basic service tier and cable programming services. We solicit comment here on whether these proposals would fulfill these statutory requirements, and, if not, how they should be modified to do so.

4. The Cable Act of 1992 states that since the rate deregulation triggered by the Cable Communications Policy Act of 1984,[6] monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable subscribers. Acknowledging that since 1984 the average number of basic channels has increased from about 24 to 30, the Act still finds that average monthly rates have risen 29 percent during the same period and that the average monthly cable rate has grown almost three times as fast as the Consumer Price Index (CPI) since deregulation.[7] The Cable Act of 1992 also requires that regulations governing rates for cable service be based on among other factors, the rates charged by cable systems subject to effective competition.[8] This leads to the basic question of whether the purpose and the terms of the Cable Act embody a congressional intent that our rules produce rates generally lower than those in effect when the Cable Act of 1992 was enacted (and if so, to what degree), or, rather a congressional intent that regulatory standards serve primarily as a check on prospective rate increases. To the extent Congress envisioned reductions in rates, we solicit comment on the extent to which this should be accomplished for the basic service tier and/or for cable programming services.[9] We solicit comment generally on the impact of rate reductions, or of limits on prospective rate increases, on the ability of cable operators to provide service to subscribers on the basic or higher level service tiers. If Congress intended for rules to lead to rate reductions, what are the defining characteristics of those systems for which Congress intended cable service rates be reduced?

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[2] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 3,9,14, 106 Stat. 1460 (1992) (hereinafter Cable Act of 1992).

[3] *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM Docket No. 92-260, *Notice of Proposed Rulemaking*, FCC 92-500 (released Nov. 6, 1992); Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992 -- Indecent Programming and Other Types of Materials on Cable Access Channels, MM Docket No. 92-258, *Notice of Proposed Rulemaking*, FCC 92-498 (released Nov. 10, 1992) (*Indecent Programming on Cable Access Channels Proceeding*); Implementation of the Cable Television Consumer Protection Act of 1992, *Broadcast Signal Carriage Issues*, MM Docket No. 92-259, *Notice of Proposed Rulemaking*, FCC 92-499 (released Nov. 19, 1992) (*Must Carry/Retransmission Consent Proceeding*); Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 192 -- Equal Employment Opportunities, MM Docket No. 92-261, *Notice of Proposed Rulemaking*, FCC 92-539 (adopted Dec. 10, 1992); Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 -- Tier Buy-Through Prohibitions, MM Docket No. 91-262, *Notice of Proposed Rulemaking*, FCC 92-540 (released Dec. 11, 1992); Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992 -- Consumer Protection and Customer Service, MM Docket No. 92-263, *Notice of Proposed Rulemaking*, FCC 92-541 (released Dec. 11, 1992); Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 -- Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations andh)Anti-Trafficking Provisions, MM Docket No. 92-264, *Notice of Proposed Rulemaking and Notice of Inquiry*, FCC 92-542 (adopted Dec. 10, 1992); Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Program Access and Carriage Regulation, MM Docket 92-265, *Notice of Proposed Rulemaking*, FCC 92-543 (adopted Dec. 10, 1992).

[4] "Subject to effective competition" is a term defined in Section 623(l)(1) of the Cable Act of 1992, 47 U.S.C. Section 623(l)(1), and discussed, *infra*, at paras. 17-18.

[5] "Cable programming service" is a term defined in Section 623(l)(2), 47 U.S.C. Section 543(l)(2), and discussed *infra* at paras. 90-110.

[6] Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[7] *See* Cable Act of 1992, Pub. L. No. 102-385 §2(a), 106 Stat. 1460; *see also* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 49, 53, 56 (1992) (hereinafter "Conference Report").

[8] Communications Act, Sections 623(b)(2)(C), 623(c)(2), 47 U.S.C. Sections 543(b)(2)(C), 623(c)(2).

[9] We discuss in more detail in later sections of this NPRM issues concerning reduced or low rates for the basic service tier and/or cable programming services. *See* paras. 32, 94 *infra*.

5. The Cable Act of 1992 permits, and to some extent may encourage, if not require, a restructuring of service offerings.[10] We solicit comment on the impact of the rate regulation alternatives presented in this NPRM on the ability and incentive of cable operators to create packages of programming at different tier levels that will be useful and valuable to subscribers. We solicit comment on whether any regulatory alternative would, as a practical matter, unduly restrict the ability of cable operators to provide a full range of services on either the basic or higher level service tiers. We seek comment generally on the impact upon the cable industry, its investors, subscribers, future growth of services and of programming, and service quality of the different approaches to rate regulation that we present in this section.

2. Standards and Procedures for Identifying Cable Systems Subject to Rate Regulation for Provision of Cable Service.

a. Statutory Requirements

6. The Cable Act permits regulation of a cable system's subscriber rates only if this Commission finds that the cable system is "not subject to effective competition." If we find that a cable system is subject to effective competition, the Cable Act prohibits the regulation of rates for that system. Where effective competition does notexist, the Cable Act states that rates for the provision of "basic cable service" are to be regulated by the franchising authority (or by this Commission in particular circumstances discussed below), while rates for "cable programming services" shall be subject to regulation only by this Commission.[11] "Effective competition", "basic cable service" and "cable programming services" are statutorily defined terms that we discuss in more detail below.

b. Discussion

7. The statute establishes three separate tests, any one of which, if met, would establish that a cable system is subject to effective competition. The first is satisfied if fewer than 30 percent of the households in the franchise area subscribe to a cable system. The second test is met if: the franchise area is (i) "served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area;" and (ii) "the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area." The third way effective competition may arise is if the franchising authority in the subject franchise area is itself a multichannel video programming distributor and "offers video programming to at least 50 percent of the households in that franchise area."[12]

8. We also seek comment on whether the standard for gauging whether households are "offered" video programming under the second and third tests should be that service is actually available to such households.[13] We plan to count each separately billed or billable customer as a "household" subscribing to or being offered cable or other video programming service. We seek comment on this tentative view. Comments are also sought on sources for data needed to evaluate such criteria, and their current availability.

9. We also seek comment on what services qualify as "a multichannel video programming distributor" for purposes of the second and third tests. The Cable Act defines multichannel video programming distributor as an entity who makes multiple channels of video programming available for purchase by subscribers or customers. As examples of such entities, Section 602(12) of the Communications Act lists: a cable operator, a DBS satellite service provider, a television receive-only satellite program distributor, and an MMDS provider. That section also states that this term is not limited to these specific examples. In assessing cable competition previously, this Commission has considered whether to take into account alternative or substitute delivery services readily available to subscribers in the home.[14] In this regard, we seek comment on whether a telephone company offering of "video dialtone" (*i.e.*, transmission capacity for video programming) service or a television broadcast station offering multiplexed multichannel service would qualify as a "multichannel video programming distributor."[15] We also seek comment on our tentative view

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[10] *See, e.g.*, Communications Act, Section 623 (a)(7)(A),(B), 47 U.S.C. Section 543 (a)(7)(A),(B). We discuss implementation of statutory provisions that limit cable systems' retiering discretion at paras. 125-27, *infra*.

[11] Communications Act, § 623(a)(2)(A), (B), 47 U.S.C. § 543(a)(2)(A), (B).

[12] Communications Act, § 623 (l)(1)(B),(C); 47 U.S.C. § 543 (l)(1)(B),(C).

[13] We observe in this regard that many cable source materials contain statistics for homes "passed", a term of art that refers to actual availability of cable service to potential cable subscribers, but does not account for noncable program delivery services such as those offered by wireless technologies. *See, e.g., Television and Cable Factbook: Cable and Services Volume D-12* (Warren Publishing 1992).

[14] *See generally Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd 4545, 4551-54 (1991).

[15] *See generally Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress*, and *Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781 (1992), *petitions for recon. pending, petitions for review docketed sub nom. Monkato Citizens Telephone Co. v. FCC*, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992), *Northwestern Indiana Telephone Co., Inc. v. FCC*, No. 92-1406 (D.C. Cir. Filed Sept. 9, 1992), *National Cable Television Ass'n v. FCC*, No. 92-1530 (D.C. Cir. filed Oct. 6, 1992), and *Community Antenna Television Ass'n Inc. v. FCC*, No. 92-1539 (D.C. Cir. filed Oct. 9, 1992); *Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd 5069 (1992), *petitions for review docketed*, (video dialtone proceeding); *Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rulemaking*, 7 FCC Rcd 4111 (1992) (proceeding on future of video marketplace). In our rulemaking addressing broadcast signal carriage issues raised by the Act, we address several other questions relating to this definition, including whether it encompasses master antenna television systems and satellite master antenna systems. *Implementation of the Cable Television Consumer Protection Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, FCC 92-499, para. 42 (released Nov. 19, 1992) (*Must Carry Retransmission Consent Proceeding*). In this docket, we will take into account any responses to those questions received in that docket.

that we should measure penetration for purposes of the second test cumulatively, *i.e.*, by adding the subscribership of all alternative multichannel video programming distributors (other than the largest) together. Thus, the 15 percent penetration figure could be met if together two competitors (other than the largest) had subscribers totalling 15 percent of the households in a franchise area, even though individually each competitor might not meet that figure. In addition, we ask parties to address whether any minimum amount of programming or minimum number of separate channels must be provided by an entity for it to qualify as a "multichannel video programming distributor." With respect to "comparable video programming," we might presume that such comparability exists under the second statutory test for effective competition if a competitor offers multiple channels of video programming and the numerical tests for the offering of and subscription to competitive service under the second test are met.[16] This presumption might be subject to rebuttal by an opposing party. We seek comment on this approach.

3. Basic Cable Service Regulation

a. Components of the Basic Service Tier Subject to Regulation

i. Statutory Requirements

10. Under the Cable Act, each cable operator must offer its subscribers a separately available basic service tier to which subscription is required for access to "any other tier of service."[17] Qualified franchising authorities are to be the primary regulators of rates for this basic tier of service, with the Commission regulating only in certain circumstances. The statute provides that the basic service tier must include: (1) all local commercial and noncommercial educational television and qualified low power station signals carried to meet carriage obligations imposed by Sections 614 and 615 of the Cable Act; (2) any public, educational, and governmental access programming required by the franchise to be provided to subscribers; and (3) any signal of any television broadcast station that the cable operator offers to any subscriber, unless it is a signal that is secondarily transmitted by a satellite carrier beyond the local service area of such a station.[18] Section 623(b)(7)(B) permits the operator to include additional video programming signals or services in the basic tier as long as the charges for their services conform to our basic rate regulations.

ii. Discussion

11. The statute requires that "must-carry" local television signals, as defined by Sections 614 and 615 of the Communications Act, must be included in the basic service tier. However, the Cable Act authorizes local television stations to exercise "retransmission consent" rights in lieu of mandatory carriage. Parties are requested to comment on how the retransmission consent provisions will affect or shape the composition of the basic service tier.[19] In particular, Section 623 (b)(7)(A)(iii) would appear to make any local signal carried pursuant to retransmission consent a basic tier channel. We seek comment on this tentative conclusion.[20] We also seek comment on whether channels carried pursuant to retransmission consent would be classified as mandatory basic service channels, even if an operator had already satisfied his signal carriage obligations. We also seek comment on our tentative finding that cable operators may add any and as many video programming services to the basic tier as they wish, provided that such services are subject to basic rate regulation.

12. The statute defines basic service as a tier "to which subscription is required for access to any other tier of service."[21] We seek comment on whether this language establishes a "basic buy through" requirement, *i.e.*, whether it precludes the offering of video services completely "a la carte" and without prior subscription to the basic service tier. Particularly in light of the plain language of the statute which limits any such "basic buy through" to other *tiers* of service, we also ask interested parties to comment on whether Congress intended to permit consumers the option of purchasing services, such as premium channels, or the services of a leased access programmer, on a standalone basis. In addition, we interpret Section 623 (b)(8)(A) as precluding an operator's requiring the purchase of services *in addition to* the basic tier as a precondition for

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A related issue is whether a leased access user offering compressed, multichannel service, or a leased access user or a franchising authority offering multichannel programming on the operator's leased access or PEG channels, on either a per-channel or a multiplexing basis, would be a "multichannel video programming distributor." Under one proposed interpretation of the Cable Act, the services the third party offered would not be available unless a customer also subscribes to the operator's basic tier. Thus, under this interpretation, a third party's services would not independently compete with a cable operator's services, and would not seem appropriately considered in our effective competition analysis. However, it may also be possible to interpret the Act as permitting the "a la carte" offering of individual program services without first purchasing the basic tier. See discussion of this issue *infra*, para. 12. In such case, would it be appropriate to consider the a la carte offering of a third party's services in an effective competition analysis? We seek comment on whether a third party offering services on an operator's own system should be considered a "multichannel video programming distributor" for purposes of determining whether that cable system is subject to effective competition.

[16] The term "video programming" is defined in Section 602 (19) as "programming provided by, or generally considered comparable to, programming provided by, a television broadcast station."

[17] Communications Act, § 623 (b)(7)(A), 47 U.S.C. § 543 (b)(7)(A).

[18] Communications Act, § 623(b)(7)(A), 47 U.S.C. § 543(b)(7)(A).

[19] Communications Act, § 325(b), 47 U.S.C. § 325(b). The Commission is considering issues relating to must-carry and retransmission consent provisions of the Cable Act in the *Must Carry/Retransmission Consent Proceeding*.

[20] We note that we have tentatively concluded in MM Docket No. 92-259 that retransmission consent channels may be used to meet the signal carriage requirements of § 614. *Must Carry/Retransmission Consent Proceeding*, para. 54.

[21] Communications Act, § 623 (b)(7)(A), 47 U.S.C. § 543 (b)(7)(A).

ordering other programming.[22] Are there alternative interpretations which would also preclude subscribers from purchasing a separate offering of a nonvideo or "institutional network" without first purchasing the basic tier.

13. The definition of what services are subject to rate regulation as part of the basic service tier appears to contemplate only a single tier, thereby effectively amending the general "basic tier" definition that remains in the Communications Act from the 1984 Cable Act.[23] Section 602 (3) defines "basic cable service" as "*any* service tier which includes the retransmission of local television broadcast signals" (emphasis supplied).[24] In particular,it appears that the 1992 Cable Act contemplates that there be a single "basic tier" of service that is subject to local regulation and that includes the services defined in Section 623 (b)(7)(A)(i),(ii)and (iii). If this were not the case, the anti-buy through provisions of Section 623 (b)(8) could be frustrated through the marketing of cumulative tiers of "basic" service. Further, the singular references in the statute to "the" basic tier suggest that Congress intended the existence of only one such tier.[25] We seek comment on our tentative interpretation.

b. Regulation of the Basic Service Tier by Local Franchising Authorities and the Commission

i. Statutory Requirements

14. The Cable Act of 1992 permits regulation of the rates for "basic cable service" only if effective competition does not exist. A franchising authority wishing to exert such regulatory jurisdiction must certify in writing to the Commission that: (1) the franchising authority will adopt and administer rules with respect to the rates subject to regulation that are consistent with the regulations prescribed by the Commission; (2) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and (3) procedural laws and rules governing rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.[26] Such a certification filed with this Commission by a franchising authority will become effective 30 days after filing *unless* the Commission finds, after notice and a reasonable opportunity for the authority to comment, that the franchising authority has not met one of the three criteria listed above.[27] If we disapprove the certification, the Commission must notify the franchise authority of any revisions or modifications necessary to obtain approval. Further, if we disapprove or revoke a certification. Section 623(a)(6) requires the Commission to exercise the franchise authority's regulatory jurisdiction until that authority becomes qualified by filing a new certification that meets the requirements set forth above. Such new certifications become effective upon approval by this Commission, which approval (or disapproval) must be issued within 90 days of filing.[28]

ii. Discussion

aa. Jurisdictional Division

15. We interpret Section 623 of the Communications Act, as amended by the Cable Act, to permit certified local franchising authorities to regulate the rates for basic cable service in areas that are not subject to effective competition unless we disallow or revoke an authority's certification. The scope of our authority to regulate directly basic cable service rates under the statute appears quite limited. We tentatively conclude that we have the power to regulate basic cable service rates only if we have disallowed or revoked the franchise authority's certification. The Act states that rates for basic cable service "shall be subject to regulation by a franchising authority" *or* "by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6).[29] Paragraph (6) of Section 623(a) only permits this Commission to exercise "the franchising authority's regulatory jurisdiction" when a franchise authority's certification is disapproved or revoked, and then only until a new certification is approved.[30] Thus, it appears that, unless a local franchise authority seeks to assert regulatory jurisdiction over basic cable service, we would have no independent authority to initiate regulation of basic service rates. We seek comment on this tentative interpretation.

16. An alternative interpretation, although one at odds with the aforementioned specific language of the act, might emanate from the broad language of the Section 623(b) mandate that we ensure by regulation that the rates for the

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[22] *Cf.* discussion *infra*, paragraph 127, of Communications Act § 623(h), 47 U.S.C. § 543(h) (dealing with prevention of evasions, including by retiering).

[23] Communications Act, § 602 (3), 47 U.S.C. § 522 (3).

[24] The court of appeals held, under the 1984 Act, that a tier of service that incorporates, in a marketing sense, the basic tier is itself also a basic tier service, although a tier added to a basic tier for a separate charge would not be considered a basic service. *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987). The court observed that otherwise, "use of the section 602(2) definition could lead to two different cable companies offering identical services having a different number of service tiers being considered 'basic cable service'; this critical difference would thus be based solely on the way these two hypothetical cable operators chose to market their services." *ACLU*, 823 F.2d 1566. Thus, for example, if an operator sells a $10 basic tier and offers an additional set of channels for $5, these would be a basic ($10) and non-basic ($5) service. However, if the operator offers a $10 basic and a $15 tier that includes the basic service as well as additional service, both the $10 service and the $15 service are basic services under the *ACLU* holding. *ACLU*, 823 F. 2d at 1566 n.31 (giving more detailed, analogous hypothetical and noting that operator employing a cumulative, rather than an incremental, marketing and pricing approach faced the prospect of having such cumulative tiers all potentially subject to rate regulation as basic services under the Section 602(2) definition). We seek comment on the effect of the 1992 Cable Act on the *ACLU* interpretation of basic service.

[25] *See, e.g.*, House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 83 (House Report) ("The purpose of Section 3 is to create a tier of low cost basic cable service.")

[26] Communications Act, § 623(a)(3), 47 U.S.C. § 543(a)(3).

[27] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4).

[28] Communications Act, § 623(a)(6), 47 U.S.C. § 543(a)(6).

[29] Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2).

[30] The House Report explicitly states that Section 623(a)(6) was intended to "specif[y] the scope of the FCC's authority to regulate rates in lieu of a franchising authority." House Report at 81.

basic tier are reasonable.[31] Under this interpretation, we might exercise jurisdiction over basic service rates either through individual petitions or complaints or through requiring notice from the operator and possibly regulatory approval prior to a rate increase, even where local authorities have not sought certification from the Commission.[32] We seek comment on whether this (or any other alternative) jurisdictional division was intended by Congress, given the terms of the Cable Act as amended.

bb. Finding of Effective Competition

17. The Cable Act requires the Commission to "find" that a cable system is not subject to effective competition before authorizing rate regulation. We propose to base our independent findings initially on the determination by the franchising authority that effective competition does not exist. We propose to have the franchise authority submit its finding and the basis for this finding to us as part of the process, discussed below, by which local authorities are certified to regulate basic service rates. These findings should take into account information submitted by cable operators to the Commission in response to any effort to collect information or data requests concerning rates of systems subject to effective competition.[33] Given the large number of franchise areas nationally"[34] and their varied competitive characteristics,[35] this approach appears to be reasonable and realistic. First, the statute on its face states that local authorities may exercise regulatory jurisdiction over cable rates only if the authority certifies that it has "the legal authority to adopt ... such regulations."[36] Since the Cable Act makes the absence of effective competition a prerequisite to regulators' legal authority over basic cable rates, we find it reasonable to require that local franchising authorities provide evidence of the lack of effective competition as a threshold matter of jurisdiction. In addition,franchising authorities may be in a superior position to gather relevant local facts and to test the accuracy of operators' representations regarding competition. Economic, statistical and other relevant data may be routinely submitted or otherwise available to local authorities as part of multichannel video programming distributors' ongoing franchise or other obligations associated with doing business in that community. Local authorities can take such information into account. We also expect that they will consider any data operators submit to the Commission as a result of data requests or reporting obligations. Our proposal, we believe, would permit in many cases a more accurate and expeditious initial effective competition analysis than the Commission could undertake without local assistance. We seek comment on this proposal.[37] Parties may also wish to comment on whether challenges to a determination of lack of effective competition may appropriately be made as part of a revocation proceeding under Section 623(a)(5),[38] as discussed in more detail below, as part of our normal procedures for reconsideration and review, or, should it prove feasible to fashion procedures for taking oppositions prior to certification approval, as part of such streamlined processes.[39] We observe that this last alternative would give operators an opportunity to challenge an effective competition finding prior to imposition of rate regulation.

18. We also tentatively find that the language of Section 623(l)(1), which expresses the tests for the presence or absence of effective competition in terms of a "franchise area", implies that determinations that effective competition is absent should be made on a franchise-area basis. Thus, if a cable system serves more than one franchise area in a geographic region, separate effective competition determinations would have to be made for each distinct franchise area.[40] Moreover, we tentatively find that if more than one cable system is authorized to operate in a given franchise area, the requisite effective competition analysis must be applied to each system. We seek comment on these tentative conclusions. We also seek comment on whether a determination of effective competition for cable programming services, which this Commission is charged with regulating, could be made on a system-wide, as opposed to franchise-area, basis. Such larger geographic units would appear to be more appropriate for federal regulation. Moreover, system-wide regulation might help ensure

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[31] Communications Act, § 623(b), 47 U.S.C. § 543(b). *See also* Conference Report at 62 (The goal of Section 623(b) "is to protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a cable system were subject to effective competition").

[32] If we adopted this approach, there may be a case in which a franchising authority believes that rate regulation is required, but for other reasons, such as lack of personnel, is unable to make the requisite certification. We seek comment on whether we should permit a local franchising authority to file a statement explaining why the authority cannot submit a certification and requesting that we assert jurisdiction. Parties advocating this approach should explain how this is consistent with the jurisdictional framework of the Cable Act.

[33] *See infra* note 63.

[34] According to current Commission records, there are approximately 33,000 cable "community units" (as defined in Section 76.5(dd) of the Commission's Rules) nationally which are subject to the jurisdiction of local franchising authorities. Although the number of "franchise areas" is lower, since a franchise may span more than one community unit operating within a distinct geographic "franchise area," we believe that this number would be large enough to make initial FCC findings of effective competition an extremely difficult task administratively. (A community unit is defined as a cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity, including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas. 47 C.F.R. § 76.5(dd)).

[35] We also seek comment on whether multichannel video programming distributors who are competitors to cable systems should be required to disclose the number of their subscribers and any other data relevant to a finding of effective competition; whether such information (*e.g.*, as to number of subscribers) is likely to be proprietary and entitled to special protection and, if so, what such protection should be.

[36] Communications Act, § 623 (a)(3), 47 U.S.C. § 543 (a)(3).

[37] We propose to make effective competition determinations on an individual case basis in connection with evaluation of complaints concerning cable programming service with respect to systems in areas where a franchising authority has not sought certification for regulation of the basic service tier. *See infra* paras. 97-110.

[38] Communications Act, § 623(a)(5), 47 U.S.C. § 543(a)(5).

[39] *See infra* para. 23.

[40] *But cf.* paragraph 21, *infra* (proposal to permit joint certifications by franchising authorities in a geographic area).

uniformity in rates across a geographic region, harmonizing with other provisions of the Cable Act requiring a uniform rate structure "throughout the geographic area in which cable service is (provided over [a] cable system."[41]

cc. Filing of Franchise Authority Certification

19. We propose that a franchise authority intending to regulate the rates for basic cable service be required to submit a certification meeting the requirements of Section 623(a)(3)(A-C), set forth above, and additionally stating the basis for its finding that its franchisee is not subject to effective competition. We tentatively conclude that a standardized and simple form can and should be used for certifying to the three criteria of Section 623 (a)(3), and that this form should include a section for the authority's statement and explanation of its initial finding that effective competition is lacking, with reference to documentable data, including any submissions made to the Commission. We seek comment on this tentative conclusion, as well as on the specific format for such a form.[42] We also invite comment on any other administratively efficient method for certification. Parties proposing such an alternative should also explain how their proposal is consistent with the goals of the Cable Act.

20. Section 623(a)(3)(B) of the Communications Act, as amended, requires that a franchising authority be able legally to adopt regulations consistent with those we establish for basic cable rate regulation. The Communications Act, as amended by the 1984 Cable Act, appeared to assume that a franchise authority derives its powers, including those to regulate rates, from state law or franchise agreements.[43] The legislative history of the Cable Act of 1992, however, suggests that the Act itself may abrogate franchise agreements in certain circumstances to permit rate regulation consistent with our rules.[44] If this were the case, however, what meaning should we give to Section 623 (a)(3)(B)? We seek comment on whether franchising authorities derive their powers to regulate from state and local laws alone, or whether the Cable Act may itself be an independent source of authority to regulate rates. To the extent the authority is not derived from state law, are there issues that need to be addressed as to which specific authorities within state and local government are entitled to exercise this authority? If the Cable Act grants franchise authorities rate regulation powers irrespective of state law, what did Congress intend by enacting Section 623 (a)(3)(B)? We also seek comment on whether exercise by this Commission of basic service rate regulation authority pursuant to Section 623(a)(6)in a state prohibiting rate regulation by local authorities would in fact constitute preemption of state law. If so, we also ask whether such preemption not only could take the form of the FCC taking jurisdiction over basic service rate regulation, but also could extend to conferring the power to regulate basic service rates on franchising authorities where they otherwise would be without such power.

21. The legislative history also appears to contemplate that two or more communities served by the same cable system could file a joint certification and exercise joint regulatory jurisdiction.[45] We propose to allow this and seek comment on this proposal, as well as on the content of rules required to give effect to this proposal. It is conceivable that franchising authorities may not choose voluntarily to make such joint filings. Are there actions we should take to provide incentives for local entities regulating a single economic entity to coordinate their activities? Should such coordination be required as part of the certification process? We seek comment on the impact of franchising authorities' decisions to proceed independently on the Act's requirement that an operator's rate structure be uniform throughout a geographic area.[46] How, under such circumstances, might a cable operator be assured that it can fulfill the uniform rate structure requirement?

dd. Approval of Certification by the Commission

22. The Cable Act states that the written certification submitted by a franchising authority to the Commission shall be effective 30 days after it is filed, unless we find, after notice to the authority and a reasonable opportunity for the authority to comment, that (1) the authority has adopted or is administering basic cable service rate regulations that are inconsistent with those we prescribe, (2) the authority lacks the legal authority to adopt, or the personnel to administer, such regulations, or (3) procedural laws and regulations applicable to the authority's rate regulation proceedings do not provide a reasonable opportunity for consideration of the views of interested parties.[47] The Act thus contemplates that unless we take explicit action within 30 days, a certification will be effective. The Act also appears to contemplate that any decision denying certification must be made within 30 days.

23. Given the expedited deadlines the Act imposes, we assume that Congress did not intend that the FCC establish a full pleading cycle with opportunity for interested parties, including the cable operator, to comment prior to expiration of the initial 30-day period. Thus, although we propose that each certification application be served on the franchisee cable system, we propose to base our decision on certification on the submission by the franchising authority alone. If a certification appears defective on its face, the franchise authority will be given notice, and the opportunity to submit additional information prior to our decision. Other interested parties, including cable operators, could subsequently challenge a certification by filing a petition for revocation once a certification is effective.[48] We seek comment on this approach, and on whether, in addition to this avenue of relief, cable operators or other interested parties would be allowed to seek reconsideration

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[41] Communications Act, § 623(d), 47 U.S.C. § 543(d). *See infra* paras. 111-15.

[42] *See* Appendix D for proposed form.

[43] *Cf.* Communications Act, § 602 (10), 47 U.S.C. 522 (10).

[44] *Cf.* House Report at 81 ("The Committee intends that, as a matter of law, except as provided in Subsection 3(j) all franchising authorities, regardless of the provisions in a franchise agreement, shall have the right to regulate basic cable service rates if they meet the conditions in section 623(a)(4).").

[45] House Report at 80.

[46] Communications Act, § 623(d), 47 U.S.C. § 543(d). *See* further discussion of § 623(d) at paras. 111-15 *infra*.

[47] Communications Act, § 623 (a)(4), 47 U.S.C. § 543 (a)(4).

[48] *See infra* paras. 25-28.

of our decision regarding the existence of effective competition and certification. We also ask interested parties to comment on what procedures we might adopt for the giving of notice and the submission of additional information by a franchise authority that would enable us to render decisions within the 30-day statutory period. We also seek comment on whether it would be possible and consistent with legislative intent to establish a highly expedited pleading cycle permitting interested parties, including cable operators, to comment prior to the 30-day deadline.

24. The Cable Act requires that, in disapproving a franchising authority's certification, we notify the authority of any revisions or modifications necessary to obtain approval. We propose to reflect this requirement in our rules. We tentatively conclude that denial of certification would be subject to our normal procedures for reconsideration, review and appeal.[49] We also propose that, absent a stay, we will assume regulation of basic service rates in a franchise area after we deny a certification (assuming that we have also found the cable system is not subject to effective competition). If we certify an authority, we propose to require the authority to notify each franchisee within 10 days of this decision. We seek comment on these proposals and tentative conclusion.

ee. Revocation of Certification

25. Subsection 623(a)(5) requires that "upon petition by a cable operator or other interested party," we "review the regulation of cable system rates by a franchising authority."[50] If we find that the franchising authority has acted inconsistently with the requirements of Section 623(a)(3), we are directed to "grant appropriate relief." If, after giving the franchising authority a reasonable opportunity to comment, we find the state and local laws and regulations do not conform to Commission rules governing basic service rate regulation, we must revoke the jurisdiction of such authority.

26. We interpret this subsection to require us to revoke an authority's certification whenever the noncompliance involves a violation of Section 623 (a)(3)(A), *i.e.*, where local or state laws are inconsistent with our regulations concerning basic service rates. However, the statute appears to contemplate other lesser remedies where the noncompliance involved Section 623 (a)(3)(B) or (C), *i.e.*, where local and state laws may be facially consistent with our regulations, but the authority has applied them inconsistently or has otherwise departed from the terms of its certification.[51] We seek comment on this interpretation. We also ask parties to comment on how their analysis of our power to act where local or state regulations are inconsistent with our rate regulations harmonizes with their analysis of our preemptive powers.;[52] Does the 1992 Cable Act effectively preempt state or local laws, *e.g.*, concerning the methodology of rate regulation, that may conflict with the rules that we establish? Can or should actions other than inconsistent local and state laws, *e.g.*, lack of adequate personnel, which would have caused us to disallow a certification in the first instance, also be the basis for revocation, or should some lesser remedy be applied? We also seek comment on what types of relief, short of revocation, we could apply. Could we, for example, suspend a certification, or impose a reporting requirement on a local authority? In cases of suspension, could we, consistent with the Cable Act, assume the local authority's rate regulation authority and obligations?

27. We also propose that a petitioner for revocation or other relief against a franchising authority serve a copy of its petition on the franchising authority, as required by statute, and that the petition contain a statement that such service was made. We also propose to permit an authority 15 days in which to file an opposition to such a petition, and a cable operator or other party ten days in which to reply. We seek comment on these proposals.

28. Finally, we seek comment on what procedures should apply if an operator in a particular franchise area, once not subject to effective competition, becomes subject to it. We tentatively find that a cable operator should be required to petition a franchising authority for a change in its regulatory status. This petition should be subject to public comment. We believe that an abbreviated pleading cycle would be appropriate, with oppositions to be filed in for example, seven or ten days. A franchising authority shall promptly inform the Commission that a cable operator has petitioned for a change in regulatory status and shall forward its findings to the Commission, including the basis for those findings. We propose to require franchising authorities to so notify the FCC within ten days of their decision. If we ratify an initial determination of the franchising authority that effective competition now exists, the franchising authority would then cease regulating basic cable service rates, and our regulatory authority over cable programming services for this system in this franchise area would also cease. Cable operators denied a change in status by a franchising authority would be entitled to seek review of that determination with this Commission, with pleadings subject to the standard filing periods.[53] We seek comment on these tentative conclusions. We also seek comment on whether a challenge to a denial of change in status regarding effective competition could or should be made as part of a petition for revocation.

ff. Assumption of Jurisdiction by the Commission

29. The Act requires that if we disapprove or revoke a franchise certification, we shall exercise the franchising authority's regulatory jurisdiction until it qualifies to exercise that jurisdiction by filing a new certification, and that we must act on the new certification within 90 days after it is filed.[54] We seek comment on the procedures that we should employ when we assume a franchising authority's jurisdiction over basic service rates. In cases of disapproval, should we require a cable operator to file its

[49] 47 C.F.R. §§ 1.101-1.120; 47 U.S.C. §§ 402, 405.

[50] Communications Act, § 623 (a)(5), 47 U.S.C. § 543 (a)(5).

[51] For example, a franchise authority might adopt rate regulation standards consistent with those we establish, but fail to apply them in a particular case.

[52] *See supra* para. 20.

[53] 47 C.F.R. § 1.45.

[54] Communications Act, § 623 (a)(6), 47 U.S.C. § 543 (a)(6). Of course, if we dismissed a request for certification on the ground that effective competition existed in the franchise area, we would not assume rate regulation jurisdiction.

schedule of basic service rates with us, in a fashion analogous to the procedures we propose below for local implementation of basic service rate procedures? For both disapproval and revocation cases, should we follow basic rate regulation procedures regarding notice of rate increases and resolution of disputes similar to those we propose for franchising authorities?[55] Parties are encouraged to specify any alternatives that they believe would be more appropriate, and in particular to comment on whether the same deadlines applied to local franchising authorities would be administratively feasible for the Commission.

c. Regulations Governing Rates of the Basic Service Tier

i. Statutory Requirements

30. The Act requires the Commission to ensure, by regulation, that rates for the basic service tier are reasonable.[56] Such regulations are to be designed to protect subscribers of any cable system not subject to effective competition from paying rates higher than those that would be charged if the system were subject to effective competition.[57] In establishing regulations governing rates for the basic service tier, the Commission must seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and itself, and it may adopt formulas or other mechanisms and procedures to achieve this objective.[58] Our rate regulations must additionally take into account seven factors:

> (1) the rates for cable systems that are subject to effective competition;
>
> (2) the direct costs (and changes in such costs) of obtaining, transmitting, and providing signals carried on the basic tier including additional video programming signals or services beyond the "must carry" local broadcast television signals, and any public, educational, and governmental access programming required by the franchising authority;
>
> (3) only a reasonable and properly allocable portion, as determined by the Commission, of the joint and common costs of obtaining, transmitting, and providing signals on the basic service tier;
>
> (4) cable operator revenues from advertising on the basic tier or other consideration obtained in connection with the basic tier;
>
> (5) the reasonably and properly allocable portion of taxes and fees imposed by any state or local authority on transactions between cable operators and subscribers or assessments of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;
>
> (6) the cost of satisfying franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and
>
> (7) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to ensure that rates are reasonable and the goal of protecting subscribers of any cable system not subject to effective competition from paying more for basic tier service than subscribers would pay if the system were subject to effective competition.[59]

ii. Discussion

31. The statute requires that our rules ensure reasonable rates for the basic service tier. The statute does not explicitly define "reasonable", instead requiring the Commission to establish regulations designed to achieve the goals set forth in the statute and reflective of the enumerated factors. We tentatively conclude that Congress intended the Commission to embody in these regulations a standard of reasonableness for basic tier rates that reflects a reasoned balancing of these statutory goals and factors.[60] We further tentatively conclude that Congress did not intend that we give greater or primary weight to any of the statutory goals as we formulate regulations to govern rates for the basic service tier, but did intend to leave the Commission discretion to determine in the rulemaking process the comparative weight to be assigned to each of the seven factors.[61] We solicit comment on this analysis.

32. We note that a low priced basic service tier could enhance the ability of potential subscribers, especially those with low incomes, to receive the minimum components of

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[55] *See infra* paras. 79-89.

[56] Communications Act, Section 623(b)(1), 47 U.S.C. Section 543(b)(1).

[57] *Id.*

[58] Communications Act, Section 623(b)(2)(A) and (B), 47 U.S.C. Section 543(b)(2)(A) and (B).

[59] Communications Act, Section 623(b)(2)(C), 47 U.S.C. Section 543(b)(2)(C).

[60] Section 325 of the Communications Act as amended by the Cable Act of 1992 requires the Commission to consider the impact of retransmission consent on rates for the basic service tier and to ensure that our retransmission consent regulations do not conflict with our obligation under Section 623 to ensure that the rates for the basic service tier are reasonable. In the *Must Carry/Retransmission Consent* proceeding, we stated that we would consider the appropriate treatment of retransmission consent compensation in establishing regulations governing rates for the basic service tier in the instant proceeding. As indicated, one of the seven statutory factors that we must take into account is the direct costs of providing signals to subscribers. We tentatively conclude that our obligation under Section 325 to consider the impact of retransmission consent on rates for the basic service tier will be fully discharged by our balancing of the enumerated statutory factors, including the direct costs of signals. We will embody the seven factors in the standard of reasonableness that will govern the lawfulness of rates for the basic service tier. We solicit comments on this analysis. We solicit comment generally on how we should take into account retransmission consent compensation in establishing regulations governing rates for the basic service tier.

[61] We solicit comment on whether Congress intended that we should give primary weight to the goal of protecting subscribers of any cable system from rates higher than those that would be charged if the system were subject to effective competition. We observe that the statute lists rates for cable systems subject to effective competition as only one of seven factors to be taken into account in establishing regulations governing the basic tier. We tentatively conclude that, while requiring reasonable rates, the statute does not *per se* require that aggregate rates for the basic tier of a cable system not subject to effective competition be no higher than the rates charged by systems subject to effective competition. We solicit comment on this analysis. We further solicit comment on the extent to which we should design our regulations to produce rates for the basic service tier that are generally lower than those in effect in the cable industry for the lowest service tier at the time of enactment of the

the basic service tier mandated by the statute.[62] On the other hand, rules designed to assure a low priced basic service tier that either formally or as a practical matter restrict the ability of cable systems to incur and recover appropriate costs could create incentives for cable systems to limit the basic service tier to the statutory minimum components. We solicit comment on the extent to which Congress intended a low priced basic service tier, and the extent to which our rate regulations should not effectively restrict a cable operator's discretion to provide programming on the basic service tier beyond the minimum statutory components. If our regulations produce low rates for the basic service tier, would this in turn require us to permit more flexibility in pricing for higher tiers? If so, would such pricing flexibility limit access by subscribers to popular cable programming services that are bumped to the higher priced tiers? What might be the impact of a low priced basic service tier on cable systems' investment in programming? We believe that any rate regulation approach should effectuate fully the goals of the Cable Act without creating unintended limits on a cable operator's discretion to tier programming services, and, indirectly, on the continued growth of cable programming services.

33. We have identified two generic approaches for regulation of rates for basic tier service: benchmarking and cost-based.[63] In the next few paragraphs we describe these two generic approaches generally and explain how we believe each would satisfy congressional objectives. We then present specific regulatory alternatives falling within the two generic approaches and seek comment on the extent to which a specific regulatory alternative should be made a component of the comprehensive scheme by which we will assure reasonable cable rates. Among the alternatives we describe is one based on the cost-of-service regulation model upon which this Commission and state public services commissions have relied in the past to regulate public utility rates. More recently, this Commission and some state public service commissions have concluded that incentive regulation is a more effective means of achieving reasonable rates for consumers.[64] In our common carrier price cap orders we have discussed at length the disadvantages associated with traditional rate of return regulation.[65] Among the most significant of its disadvantages is that it is neither simple nor inexpensive to administer. Because the Cable Act of 1992 directs us to craft rules that will reduce burdens on cable operators, franchising authorities, this Commission, and consumers, we tentatively conclude that we should not select a cost-of-service alternative as the primary mode of cable rate regulation unless we are unable to gather the information needed to develop one of the other alternatives described in the following paragraphs. We propose to adopt one of the benchmarking alternatives as the primary mode of regulation of basic service tier rates. We tentatively conclude that each of these benchmarking alternatives could achieve reasonable rates at lower costs and with less administrative burdens than could traditional cost-of-service regulation. We nonetheless conclude that cost-of-service regulatory principles could have a secondary role for cable operators seeking to justify the reasonableness of rates that do not meet our primary benchmarking standard.[66] We seek comment on these tentative conclusions.

34. *Benchmarking.* By a benchmark rate we mean a price against which a given cable system's basic tier rate would be compared. The system's rate would be presumed reasonable if it did not exceed the benchmark. Under a benchmarking approach to rate regulation, the Commission would establish a benchmark rate, or a simple formula which could be used to derive such a rate. Cable systems with rates exceeding the benchmark price by a significant amount as determined by the Commission would be required to reduce their rates to the benchmark level unless the system could justify a rate higher than the benchmark.[67] The benchmark would permit identification of systems with presumptively unreasonable rates, while establishing a zone of reasonableness for systems with rates below the benchmark. Relying on a benchmark alone to define a reasonable rate would allow those systems with

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Cable Act of 1992. Should we seek to do so, we solicit comment on the balancing of the statutory factors for the basic service tier that would accomplish this result.

[62] *See* Communications Act 623(b)(7)(A), 47 U.S.C. Section 543(b)(7)(A). We discuss the components of the basic service tier at paras. 10-13, *supra*.

[63] As we explain at para. 92, *infra*, these generic approaches could also be applied to regulation of rates for cable programming services. In a separate *Order*, we have directed cable systems to submit to the Commission by January 22, 1993, rate and other information. *See Order*, FCC 92-545, released December 23, 1992. This information will assure that we have an adequate record on which to fully assess the alternatives for regulation of the basic service tier and cable programming services that we discuss in this NPRM.

[64] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket 87-313, Report and Order and Second Further Notice, 4 FCC Rcd 2873 (1989) (*Price Cap Order*) and Erratum, 4 FCC Rcd 3379 (1989), *modified on recon.* 6 FCC Rcd 665 (1991)*rev'd in part on other grounds* AT&T v. FCC, No. 91-1178 (D.C. Cir. Sept. 8, 1992); Second Report and Order, 5 FCC Rcd 6786 (1990) (*Second Price Cap Order*) and Erratum 5 FCC Rcd 7664 (1990), *modified on recon.* 6 FCC Rcd 2637 (1991), *appeal docketed*, D.C. PSC v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991).

[65] *Price Cap Order*, 4 FCC Rcd 2873, 2889-93 (1989); *Second Price Cap Order*, 5 FCC Rcd 6786, 6789-92.

[66] The Fifth Amendment to the United States Constitution prohibits taking of private property for public use without just compensation. A substantial body of judicially approved principles has been established affecting the limits of rate regulation of public utilities, including telecommunications companies. We solicit comment on the extent to which these principles control the rate regulation of cable service that we could undertake under this statute. We solicit comment on whether the various alternatives we have set forth for rate regulation of cable service in this NPRM are acceptable under the Fifth Amendment. We solicit comment on whether, in determining a regulatory framework's consistency with the Fifth Amendment, we may or must consider the impact of regulation on an individual tier, cable service as a whole including both regulated and nonregulated services, and/or company enterprises as a whole, if any, including other cable systems and lines of business. We solicit comment generally on circumstances under which rate regulation of cable service would lead to an unlawful taking.

[67] We solicit comment identifying the standards we should employ for this showing. One possibility would be to apply cost-of-service principles as discussed at paras. 57-61 *infra*. Alternatively, we could require cable systems to show that as applied to them the benchmark would be confiscatory under applicable constitutional standards. We solicit comment on these alternatives.

rates below the benchmark to raise rates to the benchmark level. We solicit comment, however, on whether to include as a component of any benchmark alternative a price cap formula to limit how quickly systems with rates below the benchmark could raise their rates to that benchmark price. We solicit comment on what such a price cap formula should be. x[68] We also propose to establish mechanisms to adjust the benchmark itself over time. The adjustment mechanism might be a formula or, if the benchmark itself is calculated pursuant to a formula, might be incorporated within the formula. The Commission could also review the benchmark price and adjust it periodically based on appropriate empirical or market considerations.[69]

35. The benchmark itself would be based on selected general industry characteristics and, if well designed, could assure that the rates of each individual system subject to it are reasonable. The benchmark would embody a balancing of the various statutory factors and goals that govern regulation of rates for cable service. A well designed benchmark would additionally assure that almost all cable systems subject to it would have neither the incentive nor the ability to show that the benchmark as applied to them produces confiscatory rates under applicable constitutional principles.

36. We recognize the potential tension between the need, on the one hand, to establish an accurate benchmark using sound data collection processes and ratemaking methodologies, and the command of the Act, on the other hand, to simplify regulation. Using a very simple formula to set the benchmark may produce a standard that is only a rough indicator of whether a cable system's basic tier rates lie within a reasonable range. Even the simple formula, however, would protect consumers from excessive rates and, by eliminating the need for detailed cost-based regulation in many jurisdictions, would keep the costs of administration and compliance low. Because the franchising authority or local citizens could easily verify a system's compliance under a benchmark model, benchmark regulation would meet the legislative goal of reducing the administrative burdens on cable operators and franchising authorities. Like the price caps used in telephone regulation, a benchmark not based on the costs of individual systems could also provide an incentive for systems to be efficient by allowing low-cost systems to keep any savings achieved through increased efficiencies. A trade-off would exist between the costs of developing a more refined set of benchmarks tailored to reflect more closely the particular conditions facing individual systems, and the costs of a coarser set of benchmarks that might either allow low-cost systems to charge rates substantially above cost or require higher-cost systems to charge below-cost rates. Allowing higher-cost systems to opt for cost-based regulation if the benchmark rate proved unreasonably low would, however, provide a safety valve to prevent confiscatory rates.

37. Under a benchmark alternative, the Commission could separate cable systems into distinct classes based upon specified variables and then define a benchmark for each class of systems. The benchmarks might then be set forth in a matrix or table. The variables used to separate cable systems into distinct classes might include such cost-defining characteristics as: homes passed per mile, number of subscribers, number of channels, system age, miles of underground cable, terrain crossed, above average programming costs, or readily identifiable costs. Another variable could be the local price level in comparison to the national price level as measured by appropriate indexes. For each of the benchmarking alternatives that we discuss below, we solicit comment on what variables should be used for defining the classes of systems to which a different benchmark rate should apply. We recognize that the extent to which a system of simple rate benchmarks would meet statutory goals would depend on the criteria used to determine the individual benchmark. One effect of benchmarks could be to cause the rates of the systems subject to the same benchmark to converge over time to that benchmark. We solicit comment on whether this would be a desirable result. If we were to conclude that such a result would not be desirable, we could also permit some benchmark adjustment based upon individual system characteristics. For example, we could adjust the benchmark applicable to an individual system based on such system costs as franchise fees or the costs of franchise requirements such as PEG channels. While "customizing" the benchmark, this might also make it less simple to administer. We solicit comment on whether we should permit individual system adjustment to otherwise widely applicable benchmarks and what measures should and could be established to permit such adjustments. We solicit comment on appropriate indexes for local and national price levels that we could use as a variable in establishing benchmarks.

38. Another important adjustment factor is a general change in the cost of doing business. Such changes often are represented by the general consumer price index (CPI) or producer price index (PPI) compiled on a national or regional basis by the Bureau of the Census and Bureau of Labor Statistics. While readily available, the CPI or PPI are baskets of goods and services that may not be useful to a local service business such as cable television. We therefore seek comment on the tentative conclusion that a local service price index (SPI) would be more appropriate than the CPI or PPI for adjusting cable rate benchmarks, if such an index can be easily determined. We also seek comment on the composition of such a local SPI,[70] how such an

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[68] We address in paras. 49-52, *infra*, price caps as one benchmarking alternative for regulating rates on the basic service tier. The issues raised there concerning a price cap benchmarking alternative generally are also relevant to consideration of possible application of price caps to govern rates below a benchmark rate. We request commenters to address the issues raised in paras. 49-52 in the portion of their comments concerning possible application of price caps to govern cable system rates below a benchmark rate, as well as in the portion of their comments addressing a price cap benchmarking alternative generally.

[69] We have proposed a similar approach in our recent proposal to reform the process we use to set the rate of return for certain telephone companies' interstate services. Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Process, CC Docket No. 92-133, Notice of Proposed Rulemaking and Order, 7 FCC Rcd 4688 (1992).

[70] It would appear that such an index should be comprised of a variety of local and popular service items from categories including: education (*e.g.*, two-year and four-year part-time tuition); indoor entertainment (*e.g.*, movie ticket prices, museum admission, cable monthly rates); outdoor entertainment (*e.g.*, amusement park, public park, and zoo admission/rides; lodging (*e.g.*, high volume hotels/motels); medical services (*e.g.*, dental tooth filing, physician office visits); personal services (*e.g.*, baby sitter rates, newspaper classified ad rates; woman's/men's hair-

index would be created, what services should be included, where data would come from, and what geographical area would be appropriate for comparison.

39. *Cost-of-Service.* Under a cost-of-service approach, the reasonableness of a cable system's rates would be determined by examining of the particular costs of the individual cable system using ratemaking principles set by the Commission. The primary advantage of a cost-based alternative is that it would permit close supervision of rates. As discussed above, a primary disadvantage is that it would be more burdensome on cable systems and regulatory authorities. We assess more fully the advantages and disadvantages of cost-of-service regulation below in paragraphs 53-61.

40. As indicated, we have tentatively concluded that cost-of-service regulation should not be adopted as the primary mode of cable rate regulation, but that it could nonetheless have a place in our regulatory framework for cable operators seeking to justify rates higher than would be considered reasonable under the benchmark standard we could adopt to regulate cable rates. In the following sections, we discuss specific benchmarking and cost-based alternatives for regulating rates. In addition to the benchmarking alternatives, we solicit comment on another alternative called the "Direct Cost of Signals Plus Nominal Contribution to Joint and Common Costs" for regulating basic service tier rates, discussed at paras., *infra.* We solicit comment generally on which among our specific proposals should be incorporated in our comprehensive framework for regulating basic rates, or how they could be combined to govern rates for the basic service tier. We also seek comment on how these proposals might be modified to achieve more effectively the goals of Section 623(b) of the Cable Act of 1992. We also solicit comment on whether we should consider adopting alternative approaches to determining the reasonableness of rates for the basic service tier, from among which either the cable system or the regulatory authority might have some discretion to choose.

aa. Benchmark Alternatives

41. *Rates charged by systems facing effective competition.* One potential benchmark would be defined using the average of rates currently charged by systems facing effective competition, as the Cable Act of 1992 defines that term. This benchmark would appear to meet the statutory goal of "protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[71] To use a benchmark based on rates charged by systems facing effective competition, however, the Commission would first have to identify those systems. Moreover, basic service tier rates of systems facing effective competition would reflect the different numbers of channels in different systems' basic tiers. To perform the necessary computations the Commission would thus need to know, at a minimum, the basic service tier rates and the number of channels in the basic tier for systems facing effective competition. This information would permit us to compute a single average rate. We might then define the benchmark to be the sum of computed average plus an additional amount defined by a percentage selected by the Commission of that average. Alternatively we could define a per channel benchmark using those data. Refining this process, we could instead group these systems based upon the number of channels in their basic tiers and then compute a simple average rate for each group.[72]

42. To create benchmarks that more accurately reflect conditions facing individual systems, the Commission might seek to determine how rates vary with cost characteristics of the systems facing competition. If sufficient data were available, regression analysis or some other statistical technique could be used to determine how rates varied with such characteristics affecting costs as homes passed per mile, number of channels, number of subscribers, the relative mix of buried and overhead cable, and the other factors described in Section 623(b). With this information, we could create a benchmark formula based upon systems subject to effective competition that shared at least some of the regulated systems' underlying cost characteristics. The ability of the Commission to arrive at an appropriate benchmark formula using systems subject to effective competition will, however, depend upon, among other things, the number of systems in competitive markets, and our ability to collect and analyze data on these systems within the limited time allotted to complete this rulemaking. Whether it is appropriate to employ a benchmark based on the rates of systems facing effective competition to govern the! rates of cable systems generally will also depend upon whether the systems facing effective competition are representative of cable systems in their costs and other characteristics.

43. We request comment on the feasibility of using the rates charged by cable systems facing effective competition to define a benchmark for basic service tier rate regulation. In particular, we request any information commenters can assemble on systems in competitive markets and on the sources of data that might be used to develop a set of benchmarks based upon their rates.[73] Are there any characteristics of some "effectively competitive" markets or the systems that operate in them that differ from other systems or markets to an extent that would make them unsuitable for consideration in establishing the benchmark? We also ask whether it would be desirable and feasible to adjust this benchmark based on the costs of systems subject to it, and whether we have data to do so. If not, what other methods might be used to make such adjustments? Commenters are invited to suggest and comment on methodologies for making such adjustments.

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cuts); participant sports (*e.g.*, bowling, public golf green fees, weekend ski lift ticket); spectator sports (*e.g.*, major league/"Grapefruit League"/"Cactus League"/minor league baseball, professional/college basketball, professional/college football, professional/college hockey); transportation (*e.g.*, bus/subway/train/cab fares, airport parking); and utilities (*e.g.*, residential electric/gas/telephone rates).

[71] Communications Act §623(b)(1).

[72] For example, if systems subject to effective competition reported between 5 and 33 channels in their basic tiers, we could group all systems with 10 or fewer channels together; those with 11 to 20 together; and those with more than 30 together.

[73] For a discussion of the potential difficulties associated with identifying these systems, see the discussion *supra* at paras. 17-18.

44. *Past regulated rates.* A second alternative would be to develop a benchmark for basic service tier rates based on rates charged in 1986 before the Cable Communications Policy Act of 1984 effectively prohibited local rate regulation of most cable systems. It may be acceptable to assume that rates in 1986 were reasonable because they resulted from a competitive bidding process for the franchise and subsequent rate adjustments were made under local franchise authority oversight. Using these data we could develop individual benchmark rates for systems operating in 1986 based upon the 1986 per-channel rate for their lowest tiers.[74] As in the previous case, some adjustment might be made in individual cases for factors generally agreed to affect costs. We could also permit an adjustment upward from 1986 rates based on construction and rebuild costs incurred by the cable system since that time. We solicit comment on the appropriate treatment of construction and rebuild costs incurred since 1986 if we adopt a benchmark based on past regulated rates. For systems not operating in 1986 we would propose a benchmark expressed on a per-channel basis to account for differences in the number of channels offered on the basic tier and based on the per channel rates of the systems operating in that year.

45. We request comment on the advantages and disadvantages of using a benchmark based on past regulated rates. If such a benchmark were used, would it be better to base it on rates charged by individual systems, or on an average of rates for all systems, or on some other formula? If we were to use this type of benchmark, would a starting year other than 1986 be preferable for any reason? Are there factors, other than inflation, that might cause per-channel rates from 1986 to be inappropriate in 1993? Should we permit cable systems to select a starting year prior to 1986? How might our proposed benchmark formula be adjusted to capture the effects of these other factors? We also request information on what data are available on rates charged in this period that might be used to compute such a benchmark. Would data from the General Accounting Office surveys of cable rates be adequate to compute a reasonable benchmark?[75] Are any data available that would allow estimation of the effects of various cost elements (particularly the elements enumerated in Section 623(b)(2)(C) of the Act) on prices? How might that data reflect the cost elements specifically described in the Act? Commenters are invited to submit data that will enable us to determine whether benchmarks based on lowest tier rates prior to deregulation would lead to rates reasonable to both consumers and operators.

46. *Average rates of cable systems.* A third alternative would use data for all cable systems operating in 1992 to develop a benchmark from the average per-channel rate for their lowest service tier. Per-channel rates would be considered reasonable if they did not exceed that average by more than some fixed amount. Systems whose rates exceeded the average rate for all systems by more than a specified amount, or by more than a specified percent, or systems which ranked among the highest few percent (*e.g.*, top 2-5%) in terms of rates would be assumed not to have rates that were reasonable. Thus, this benchmark would identify those systems whose rates were unusually high or substantially above the average.

47. This standard would have the advantage that data would be more readily available for calculating the benchmark, and consumers would be protected against rates far exceeding the general industry practice. Unadjusted, however, the benchmark would not reflect competition but merely average performance in the industry; if monopoly profits were reflected in the rates of at least some industry segments, they would be incorporated in the average rate. In addition, over time the average rates would be affected by regulation and would cease to be an independent measure of industry performance. Nonetheless, at least in the initial period following passage of the Cable Act of 1992, national average rate data might be readily available and appropriate for defining an initial set of benchmark rates. We request comment on the validity of a measure based on average industry rates. We also inquire as to the best source of data for calculating the benchmark if such a standard were adopted.

48. *Cost-of-Service Benchmark.* Under this approach to developing a benchmark, we would use engineering, operating, programming and other cost data gathered in this rulemaking to construct the costs of an "ideal" or "typical" cable system or systems, possibly on a per channel or per subscriber basis. As with other benchmark alternatives, we could establish a single national benchmark for all cable systems, several benchmarks reflecting significant characteristics of cable systems, or a formula for calculating benchmarks, including cost differences across different geographic areas. This approach could produce a benchmark roughly related to cost without requiring detailed examination of actual costs of individual systems. For this reason, this approach might be a useful alternative if implementation of other benchmark alternatives proves infeasible to implement. We seek comment on the feasibility and desirability of developing and applying a benchmark based upon constructing "ideal" or "typical" system costs. Parties supporting this approach should submit specific and detailed cost data to be included in such a benchmark, along with detailed information about how the data were developed, including data sources, validity, and reliability.

49. *Price Caps.* A price cap benchmark would be a formula set by the Commission to define reasonable increases in rates for the basic tier. For this reason, we would not intend to use the price cap formula to assess initially whether a system's rates were reasonable. The price cap formula would instead govern changes to rates that have been found reasonable under some other alternative, either based upon cost-of-service or another benchmark alternative.

50. A price cap formula permits the regulated company to adjust its prices when certain variables contained in the price cap formula change. For example, in the price cap regime governing the interstate service rates of AT&T and the large local telephone companies, price ceilings are periodically revised to reflect easily observable changes in costs generally lying beyond company control. The ceiling

[74] For example, the benchmark per channel rate could be an individual system's 1985 basic tier per channel rate adjusted by using changes in the Consumer Price Index (or a service price index) between 1985 and 1993 to capture the effect of inflation in the intervening years.

[75] U.S. General Accounting Office, *National Survey of Cable Television Rates and Services*, GAO/RCED-89-193, August 1989. *See also* House Report at 31-33 (discussing 1989, 1990, and 1991 GAO reports).

can also be lowered to reflect industry or nationwide gains in productivity and raised to allow for inflation. As for AT&T and the telephone companies, under the price cap alternative each cable system could have a different rate cap determined by the prescribed formula. The price cap formula would apply to an existing rate and would control changes to the cable system's prices over time. We solicit comment on the price cap alternative generally and whether we should make it a component of a comprehensive regulatory scheme for rates. Is a price cap approach consistent with the intent and legislative history of the statute? Could the Commission reasonably arrive at a price cap methodology for an industry that historically has not been subject to rate regulation? Are certain characteristics of the cable industry less conducive to price cap regulation than other industries? We ask for comment generally on whether the price cap model applied to AT&T and the telephone companies is appropriate for the cable industry, and, if not, what modifications should be made to it should we adopt a price cap alternative for regulation of the basic service tier.

51. The Commission has found the price cap approach to be an attractive alternative to cost-of-service regulation in the telephone industry. Under a price cap, companies have an incentive to reduce costs and operate efficiently. It avoids the perverse incentives of rate of return regulation under which, for example, more expense can mean higher rates, not less profit. Price caps also minimize regulatory intervention and thus the cost to government and to the companies dealing with government. With its emphasis on prices, a price cap alternative permits companies reducing costs faster than the industry, or the nation as a whole, to earn higher profits than other companies. We ask for comment on whether the Cable Act of 1992 would require a company earning such profits to reduce its rates. We also ask for comment on whether we should permit a price higher than the cap for companies demonstrating that their costs are increasing faster than the industry or national average.

52. If we adopt a price cap alternative to govern rates for the basic tier, we would propose to define and to control rate changes permitted under this alternative. We would additionally need to determine how and when to revise the cap, and to select an appropriate price index to include among permitted adjustments. An overly rigid price cap formula could frustrate cable operators' ability to meet subscribers' needs. We seek comment on whether and, if so, how a price cap formula might accommodate rate adjustments to reflect: changes in subscriber penetration, channel capacity, the nationwide level of prices, the relative contribution of regulated revenues to total cable revenues, franchise fees and requirements, and other factors relevant to the Act's regulatory objectives.[76] We seek comment on how directly changes in cable operating costs are captured or reflected by changes in the Gross National Product-Producer Index (GNP-PI) and whether another index would more accurately reflect inflation's impact on cable operations.[77] Also, we seek comment on how the price cap should be adjusted to reflect additions or reductions to the number of channels included on the basic tier. For example, is an adjustment based on short term incremental cost changes a reasonable standard or would another test better achieve the goals of the statute?

bb. Individual System Cost-Based Alternatives

53. *Direct Costs of Signals plus Nominal Contribution to Joint and Common Costs.* Under this alternative, the Commission would prescribe guidelines for basic service tier rate regulation by the local franchise authority that used an individual system's costs to define reasonable rates. Cable systems would be required to keep their accounting records according to generally accepted accounting principles (GAAP) and to provide those records, as requested, to the local franchising authority.[78]

54. The franchise authority would be required to find reasonable basic service tier rates that allowed recovery of at least the direct costs of the channels in the basic tier.[79] We envision that the major component of such direct costs would be programming costs, including both payments to cable networks and retransmission fees to broadcast stations. Allowing cable systems to pass the former costs through to subscribers might reduce operators' incentives to remove8 highly-valued programming from the basic tier.[80] Not allowing operators to pass on programming costs might force operators to provide the basic tier at a loss and require them to make up the loss on other programming services. Whatever equipment used and operating costs incurred to activate additional individual channels in this tier would also be covered.

55. In addition, the rates for the basic service tier would include a nominal contribution to the joint and common costs of the system as a whole.[81] Under the statute, basic service tier rates can recover "only such portion of the joint and common costs . . . as is . . . reasonably and properly allocable to the basic service tier."[82] This requirement would set an upper bound on basic service tier rates that could be considered reasonable under Commission guidelines. Within this limit, the Commission has several options for treatment of joint and common costs in basic service tier regulation. The Commission could set guidelines that resulted in rates that recovered far less than the fully distributed cost of providing the service in order to provide assurance of service for lower-income viewers.[83]

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[76] The relative contribution of regulated revenues to total cable revenues could become an increasingly significant factor if cable operators elect to use their distribution plant also for personal communications services or to lease their excess capacity for telecommunications services. *See, e.g., Into the Fibersphere*, George Gilder, Forbes, December 7, 1992.

[77] See para. 38, *supra*.

[78] *See* note 84 *infra*.

[79] Because rates determined using this alternative would not necessarily permit full recovery of basic service tier costs, it would generally not offer cable operators relief from benchmark rates that the operators believed were confiscatorily low. Therefore, this alternative would not be suitable for use as a "safety valve" mechanism by which cable systems could seek to justify rates higher than a benchmark rate.

[80] We note that such a pass-through is contemplated in the legislative history of the Act. *See, e.g.*, House Report at 82.

[81] Communications Act, Section 623(b)(2)(C)(iii), 47 U.S.C. Section 543(b)(2)(C)(iii). *See also* Conference Report at 63.

[82] 47 U.S.C. Section 543(b)(2)(c)(iii).

[83] The Commission and the states have established mechanisms to provide "Lifeline" service for lower-income telephone subscribers. These mechanisms seek to ensure access for lower income telephone subscribers by lowering the monthly recurring charge for basic telephone service and recovering costs that

This would likely lead to a basic service tier composed primarily or solely of local broadcast channels and public, educational, and governmental channels. Alternatively, the Commission could set guidelines that would permit higher basic service tier rates in order not to discourage offering of a broader basic service tier with a larger number of channels, including popular cable channels. This alternative would, however, require more elaborate cost allocation rules. Rules that the Commission might apply to the allocation of joint and common costs, and to the determination of allowable costs, are proposed in Appendix A.[84] The Commission might also leave to the franchise authority some discretion in setting the level of basic service tier rates, as long as they recovered at least the direct costs of the basic service tier channels but no more than those costs plus a maximum share of joint and common costs permitted by Commission rule.

56. We request comment on the above proposal to adopt Commission guidelines for cost-based basic service tier rate regulation. We request comment on the appropriate criteria for setting basic tier rate ceilings, and on the amount of discretion we should accord local franchise authorities in setting basic service tier rates.

57. *Cost of Service.* Under this alternative, a cable system's rates would be reviewed using the established standards of cost-of-service regulation traditionally applied to public utilities, including common carriers providing interstate communications services. The broad principles of cost-of-service regulation are well established.[85] While these principles could be implemented in a rigorous fashion with extensive cost-accounting requirements, we believe such an approach would be inconsistent with legislative intent.[86] For this reason, we propose to use simplified cost accounting requirements described in Appendix A if cost-of-service regulation becomes a component of our comprehensive model for regulating cable rates.

58. Like the other alternatives, cost-of-service regulation has advantages and disadvantages. Companies can meet service demand because service revenues may be set to cover operating expenses and capital costs. Yet, since cost-based rates only compensate for the cost of providing service, if the cost-of-service regulation is properly applied, companies cannot extract monopoly rents from consumers. On the other hand, cost-of-service regulation gives regulated companies little incentive to be efficient, to improve service, or otherwise to make regulated service more attractive to consumers. Cost-of-service regulation also imposes high costs on the regulators and regulatees. It forces companies to devote substantial resources to participating in the regulatory process, burdening them with accounting and reporting requirements. We are concerned that cost-of-service accounting may require a significant (and potentially expensive) departure from current industry accounting practices. We seek comment on the relative advantages and disadvantages of applying cost-of-service regulation to the basic tier.

59. Because of its disadvantages, we tentatively conclude that cost-of-service regulation should not be the primary method of regulating rates for basic tier service if the record that we gather in this proceeding will support a benchmark alternative.[87] Our preferred approach would be for rates to be governed generally by a benchmark, with cable operators permitted to attempt to justify higher rate levels based on cost-of-service ratemaking principles. Under the cost-of-service approach, the local franchising authority, or the Commission where the local authority's application for certification has been denied or its certification has been revoked, would apply cost-of-service ratemaking principles to determine whether the cable system's rates for its basic tier service are reasonable, based on showings made by each cable operator.[88] We solicit comment on these tentative conclusions.

60. We additionally seek comment generally on the impact of cost-of-service regulation on the cable industry. We ask how such regulation would affect the ability of cable operators to expand their channel capacity and program offerings. We also seek comment on the implications of cost-of-service ratemaking on the industry's ability to recover its investment, including goodwill, and to service its

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would otherwise be charged to such subscribers from interexchange carriers on a per-line charge for interstate costs and by varying mechanisms for intrastate costs.

[84] Some of the alternatives that we present for regulating cable service rates are cost based. The Cable Act of 1992 could be interpreted to permit, while not mandating, cost-based regulation of some or all aspects of rates of cable service. *See* Communications Act §623 (b) (2) (c) (including direct costs of signals and joint and common costs as factors in determining reasonable basic tier rates); Communications Act §623 (b) (3) (basing rates for equipment on actual costs); Communications Act §623 (c) (2) (including capital and operating costs as a factor in determining unreasonable rates for cable programming service). In order to assure that local franchising authorities and the Commission would be able to implement cost-based regulation, if that regulatory alternative is adopted for some or all aspects of cable service, this NPRM proposes simplified cost accounting requirements for cable systems. These cost accounting requirements, set forth in Appendix A, are based on Generally Accepted Accounting Principles (GAAP), and should be simple for cable systems to use and regulatory authorities to administer. They would be adequate to implement the cost-based regulatory alternatives that we describe in the rulemaking, but would not be necessary for other non-cost-based alternatives. If we adopt a regulatory alternative that does not rely on cost-based regulation we may not adopt these proposed cost accounting requirements. We solicit comment on these proposed simplified cost accounting requirements.

[85] *See, e.g., Bluefield Water Works v. PSC*, 262 U.S. 679 (1923) and *FPC v. Hope Natural Gas*, 320 U.S. 591 (1944) (*Bluefield/Hope*).

[86] The statute requires the Commission in establishing regulations for the basic service tier to seek to reduce administrative burdens on subscribers, cable operators, franchising authorities, and the Commission. Communications Act, §623 (b) (2) (A), 47 U.S.C. §543 (b) (2) (A). *See also* House Report at 83.

[87] This conclusion is fully supported in the legislative history of the Act. *See, e.g.,* House Report at 83 ("The FCC should create a formula that is uncomplicated to implement, administer, and enforce, and should avoid creating a cable equivalent of a common carrier 'cost allocation manual.'").

[88] As we discuss at para. 48, *supra*, cost-of-service principles could be applied to representative industry cost data to design cost-of-service benchmarks, avoiding consideration on an individual basis of the costs of every cable company subject to regulation. This approach assumes the availability of sufficient representative industry cost data. This Commission sets a single cost of capital for interstate access for 1,400 local exchange telephone companies. Some 700 small local exchange carriers file rates based not on their own actual costs, but on an average cost schedule.

current capital debt. We request comment on whether we would need to include transition mechanisms if we were to adopt a cost-of-service regulatory model. We also seek comment on whether cost-of-service regulation would require cable operators to deaverage rates for franchise areas served by a common cable system in circumstances where cable operators now average rates on a system-wide basis, and the impact of this deaveraging on both the cable industry and subscribers. We seek comment on the optimal degree of cost averaging and the feasibility of establishing system-wide basic tier rates.

61. If cost of service ratemaking is used as a "safety net" to allow cable operators to defend rates challenged under a benchmark test, we believe that the efficiency of the appeal process could be greatly enhanced by establishing standards for the showings that should be made in such an appeal process. We note that cost-of-service regulation requires the regulatory authority to make determinations relating to four major cost components: rate base, the cost of capital, depreciation, and operating expenses. It also generally requires rules to govern the design of rates once determinations have been made in these four areas. In order to establish standards for the showings that should be made by cable systems seeking to defend rates higher than the benchmark, we propose to adopt guidelines in each of these areas. We solicit comment on what requirements we would need to adopt in these areas and on the impact on the cable industry and subscribers of those requirements. We set forth in more detail in Appendix B the issues in each of these four areas that would require resolution for cost-of-service regulation to be implemented, ans solicit comment on those issues.

d. Regulation of Rates for Equipment

i. Statutory Requirements

62. The Cable Act of 1992 directs the Commission to establish standards for setting, on the basis of actual cost, the rate for installation and lease of equipment used by subscribers to receive the basic service tier, including converter boxes and remote control units, and installation and lease of monthly connections for additional television receivers.[89]

ii. Proposals

63. Based on the language and legislative history of Section 623(b)(3), we tentatively conclude that Congress intended to separate rates for equipment and installations from other basic tier rates. The statute itself addresses rates for equipment used to receive basic tier service and related installation in a subsection separate from those dealing with cable service rates. The statute requires cable companies to base their rates for this equipment and installation on actual costs, while cost is only one of several factors we are directed to consider in determining rates for basic tier or cable programming services. We also tentatively conclude that, to be consistent with the statute's intent, the rates for installation should not be bundled with rates for the lease of equipment. We believe that this unbundling could help to establish an environment in which a competitive market for equipment and installation may develop.[90] We seek comment on these tentative conclusions, especially on the feasibility of a competitive market for installation services.

64. Although we tentatively conclude that equipment covered under this section of the Act includes the converter box, remote control unit, connections for additional television receivers, and wiring other inside cabling,[91] we seek comment on the extent of this coverage.[92] We believe that our rules should clarify the relationship between Section 623(b)(3), which requires regulating, on the basis of actual cost, "equipment used for the basic tier," and Section 623(c), requiring regulations for cable programing services, which includes the installation or rental of equipment used for the receipt of such programming services. For the latter, the Commission must establish standards for determining whether the rates are unreasonable and, as for basic tier service, cost is to be only one of several factors to consider.

65. On the one hand, it appears that Congress may not have intended to limit regulation, on the basis of actual cost, to that equipment only used for basic tier service. For example, Section 623(b)(3)(A) specifically lists an addressable converter box needed to access video programming on a per-channel or per-program basis among the equipment subject to the actual cost standard.[93] On the other hand, the Act includes equipment and installation in the

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[89] Communications Act § 623(b)(3), 47 U.S.C. § 543(b)(3).

[90] This would be consistent with Section 17 of the Cable Act of 1992, which requires us to adopt regulations "to promote the commercial availability, from cable operators and retail vendors that are not affiliated with cable systems, of converter boxes and of remote control devices compatible with converter boxes." Communications Act § 624, 47 U.S.C. §544. We recognize, however, that installation by those unaffiliated with the cable operator might increase theft of service, and we seek comment on safeguards which might alleviate this problem. We also recognize the potential signal leakage problem posed by third-party wiring of homes for cable, which we intend to address in the proceeding on home wiring. Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM Docket No. 92-260, *Notice of Proposed Rulemaking*, FCC 92-500 (released Nov. 6, 1992).

[91] The requirement that cable systems base rates for inside cabling on actual costs may affect the charge to a customer who discontinues service. *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM Docket No. 92-260, *Notice of Proposed Rulemaking*, FCC 92-500 (released Nov. 6, 1992).

[92] We solicit comment on whether Section 623(b)(3) would apply to equipment used to receive audio services if offered as part of the basic tier. We also tentatively conclude that equipment used by a cable operator to trap programming so that a subscriber can receive only basic tier service is not subject to Section 623(b)(3) because this equipment is not intended for direct use and control by the subscriber. We request comment on this tentative conclusion and whether any other equipment exists that is covered under this provision of the Act. *See Indecent Programming on Cable Access Channels Proceeding* at para. 9 (discussing lock boxes to block certain leased commercial access programming).

[93] In addition, the legislative history indicates a change in wording from "equipment necessary by subscribers to receive the basic service tier" in the original House bill, to "equipment used by subscribers to receive the basic tier." The Conference

definition of cable programming services.[94] If we assume that Congress intended different standards for determining the reasonableness of rates for equipment used to receive cable programming services, it is unclear how to treat equipment that is used for the provision of both basic tier service and cable programming services. Therefore, we request comment identifying any equipment not used for basic tier service and the extent to which the actual cost standard of Section 623(b)(3) controls the rates charged for equipment used for more than just basic tier service. We solicit comment on whether the only equipment that should be subject to Section 623(b)(3) should be equipment that is necessary to receive basic service tier programming, and whether equipment, if any, used only to receive cable programming services would not be subject to Section 623(b)(3).

66. We propose requiring operators to base charges for equipment covered by Section 623(b)(3) on direct costs,[95] and indirect cost allocations, including reasonable general administrative loadings and a reasonable profit. Cable operators would amortize the costs of equipment over the average life of that equipment to determine the monthly equipment rate. The cost of maintaining and servicing equipment should be factored into leased rates for equipment.[96] If the Commission adopts a cost-of-service showing requirement for basic tier rates, cable companies could allocate a share of the general administrative overhead expenses on the same basis that they allocate to basic tier services, which would simplify the rate setting process for equipment.[97] If we adopt the proposal that basic tier rates include only a nominal contribution to overhead, it is unclear whether the same loading should apply to equipment. It appears that Congress intended low rates for equipment and installation, but Congress might have intended actual costs to include a share of joint and common costs allocated using a fully distributed cost methodology. We seek comment on which allocation rule would more accurately reflect congressional intent concerning rates for equipment covered by Section 623(b)(3).

67. Alternatively, cable operators may wish to sell equipment to their customers.[98] The sale may occur as a one-time payment or over a period of time. The Act, however, appears to contemplate that cable operators would be limited to recovery of actual costs, however we define that term. We recognize that actual costs may vary depending on the length of payment schedule. The purchaser would probably be independently responsible for repair of the equipment, unless a service contract were also purchased. In addition, cable operators may have a competitive advantage as an alternative market for cable equipment develops because customers will not have or may not know of other equipment suppliers. Therefore, we ask whether customers purchasing on time from the cable operator should be permitted to change their minds and purchase equipment from an alternative source. If this occurred, the cable operator would have to discontinue that customer's monthly equipment charge, but the equipment could be sold or leased to another customer as used equipment at a rate reflecting recovered costs. We seek comment on this alternative.

68. We propose determining the actual costs for installation on the same basis as for equipment. Because we believe that this determination will require allocating many joint and common costs (*e.g.*, the amount of time or the number of trucks used for installations versus other company functions), we propose not to prescribe any allocation rules but rather to require the cable operator to bear the burden of showing that its implementation of those general allocation rules is reasonable.[99] To the extent that installation costs have traditionally been recovered through a one-time charge, and because the length of time a subscriber will continue service is unpredictable, it appears reasonable that companies be permitted to continue recovering these costs as one-time charges.[100]

69. The Commission recognizes that costs for installation will vary depending on whether the dwelling has inside cabling already.[101] It may thus be more reasonable to require two installation rates, one for previously wired dwellings and one rate for new inside cabling. This could encourage competition, especially for simple installations

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Report says that this language is meant to give the Commission greater authority to protect the interests of the consumer. Conference Report at 64.

[94] In fact, the definition of cable programming service was amended in conference to include installation and lease of equipment. *See* Conference Report at 66.

[95] A cable operator may determine direct costs for equipment in several manners. One option is to use the invoice price to the operator of the equipment actually used by the customer. Another possibility is to use the cost of all equipment acquired in one year (or another appropriate period of time) and allocate these costs among individual customers. A third alternative would be to develop a benchmark by taking an average (national or regional) of equipment costs for cable operators similar to a benchmark approach for regulating the basic tier. We believe that the last alternative would require that high cost operators be given the opportunity to justify higher than average rates. We seek comment on which of these alternatives strikes the optimal balance among our goals of simplicity, satisfying the actual cost standard, and fairness for consumers and operators.

[96] The House Report says that actual cost includes normal business costs such as depreciation and service. House Report at 83. However, a separate charge for servicing equipment might encourage a competitive market for equipment repair.

[97] If basic tier rates are not based on costs plus overhead loadings, companies would have to make a separate showing of overhead expenses to be allocated to equipment, which could be burdensome.

[98] Although the statute refers to the lease of equipment, this alternative assumes that Congress's main concern was preventing customers from paying for equipment many times over through monthly rental fees. *See* House Report at 83-84.

[99] We have indicated that if the cost-based regulation alternative discussed above becomes part of our comprehensive regulatory framework, we intend also to adopt some simple allocation rules. If we adopt such rules for cost-of-service rate regulation, we would propose that they also apply for determining the actual costs of equipment and installation covered by Section 623(b)(3).

[100] On the other hand, we do not intend to *require* that these costs be recovered through a one-time charge. Cable operators would be free to recover those costs through a series of monthly charges.

[101] Whether the franchise has matured might be an important factor because dwellings are more likely to have been wired previously.

(or customers could do it themselves).[102] We request comment on whether costs vary enough to reasonably require cable operators to develop two separate rates for installation or use an average rate and whether that decision should be left to the discretion of the local franchising authority. Should there also be provision for a surcharge when the distance between a customer's premises and the operator's distribution plant is substantial? Commenters supporting such a surcharge should discuss when its application would be reasonable and also how it should be calculated.

70. Many operators charge less than actual costs for service installation as part of their marketing efforts. We seek comment on whether §623(b)(3) reflects a legislative intent to prohibit such promotional offerings. Or can the continuation of these promotional offerings be harmonized with the "actual cost" language of section 623(b)(3)? We also ask whether promotional offerings can increase cable service penetration, thereby resulting in economies of scale that could reduce costs overall of providing equipment to subscribers. We ask whether it would be consistent with congressional intent to therefore permit certain types of promotional offerings. Finally, we ask whether the actual cost provision of the statute is contravened if individual promotions do not fully recover costs as long as provision of equipment in general does recover "actual costs."

71. Section 623(b)(3)(B) also specifically directs the Commission to establish, on the basis of actual cost, rates for installation and monthly use of connections for additional television receivers. We tentatively conclude that cable operators should use the same cost methodology they use for installation of other equipment to calculate the rates for installation of connections for additional receivers.[103] If additional connections are installed at the same time a subscriber's initial service is installed, we propose that cable operators be limited to recovering the incremental costs of the additional installation. We request comment on the costs associated exclusively with providing connections for additional television receivers. We tentatively conclude that the cost of cabling used for additional connections should be recovered through one-time charges or charges that would end when the operator had recovered those costs. We specifically request comment identifying any costs associated with technical requirements, such as boosting a signal, involved in providing additional connections.

e. Costs of Franchise Requirements

i. Statutory Requirements

72. The statute requires that regulations governing the basic service tier shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise.[104]

ii. Discussion

73. We have tentatively concluded that the purpose of this statutory requirement is to assure the establishment of standards that will permit the cable operator to identify on subscriber bills pursuant to Section 622(c)(2) the amount of the bill attributable to franchise requirements.[105] We do not interpret this section as mandating that we establish separate cost-based charges apart from those for the basic service tier generally for either the customer or the users of public, educational, and governmental channels for costs attributable to franchise requirements. We solicit comment on this tentative conclusion. We further tentatively conclude that we should require that the costs attributable to satisfying franchise requirements should include (1) any direct costs of providing any services required under the franchise, (2) the sum of per channel costs *for the number of channels used to meet franchise requirements for public, educational, and governmental channels, and (3) a reasonable allocation of overhead. In Appendix A we set forth accounting and cost allocation requirements that could be used with the cost-based regulatory alternatives for regulation of rates for cable service. Should we at least in part adopt a cost-based regulatory alternative, we propose to require that the per channel costs and allocation of overhead for purposes of implementing Section 622 (c)(2) be determined in accordance with the proposed accounting and cost allocation requirements set forth in Appendix A. If we do not adopt a cost-based regulatory alternative, we propose to require that cable systems use reasonable methods to determine per channel costs and allocations of overhead. We solicit comments on these proposals.

f. Customer changes.

i. Statutory Requirements

74. The Cable Act of 1992 requires that regulations for the basic tier also include standards and procedures to prevent unreasonable charges for changing equipment or service tiers. Charges for changing the service tier must be based on cost.[106]

ii. Proposals

75. It appears that that Congress broadly intended to protect subscribers from unreasonable charges for changes in service tiers.[107] We tentatively conclude, therefore, that regulations adopted to implement Section 623(b)(5)(C) should apply to any changes in the number of service tiers that are intiiated at the subscriber's request after installation of initial service.[108] We tentatively propose to require that charges for changing service tiers not exceed a nominal amount "when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly

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[102] *But see* note 90, *supra* for a discussion of problems that may result from third party installations.

[103] We seek comment on difficulties associated with splitting a signal for additional connections that might require that only cable operators provide installations.

[104] Communications Act, §623(b)(4), 47 U.S.C. §543(b)(4).

[105] *See* para. 175, *infra*. for our proposals to implement amendments to Section 622(c).

[106] Communications Act § 623(b)(5)(C), 47 U.S.C. § 543(b)(5)(C).

[107] See House Report at 84.

[108] In paras. 12 and 13, *supra*, we solicit comment on whether

simple method."[109] The Commission seeks comment on whether and, if so, at what level we should set the nominal amount when this condition is met. We also seek comment on what constitutes "similarly simple methods," as that term is used in the statute.

76. To otherwise assure that subscribers do not pay unreasonable charges for changes in service tiers not made by coded entry on a computer terminal or by other simple methods, we solicit comment on two alternatives. First, we could require that charges be based on the actual costs of making service tier changes at the subscriber's request, including any direct costs and a reasonable allocation of indirect costs and overhead and a reasonable profit. This would assure that cable operators recover the costs of making customer changes plus a reasonable profit from the charges for that activity, but this could result in higher charges to subscribers than our second alternative. Under the second alternative, as for changes effected by coded entry on a computer terminal, we could require that charges for changes in services tiers effected by other means recover only nominal costs. This could help to keep charges for changes in service tiers low, but could increase burdens and costs on cable operators for this activity by encouraging subscribers to order service changes more frequently. In addition, it would require that costs of customer changes be recovered from other services. We solicit comment on the advantages and disadvantages of these alternatives, and whether Congress intended cable operators to make a reasonable profit on changes in service tiers.

77. We similarly solicit comment on applying these alternatives to define reasonable charges for changing equipment.[110] Should we select the first alternative for equipment, we observe that the charge for a change in equipment would be generally based on actual cost, *i.e.*, direct costs plus an allocation of indirect costs and a reasonable profit. *See* para. 66, *supra*. We seek comment on whether Congress intended for cable operators to make a reasonable profit on changes in equipment. We also seek comment on our tentative conclusions and proposals relating to customer changes and on how best to implement them.

78. In addition, we request comment on whether the implementation of this rulemaking could encourage customers to change service tiers. Subscribers may wish to alter their service should cable operators retier their programming to create a less expensive or fewer channeled basic tier or because of anti-buy-through provisions. We solicit comment on whether costs associated with initial retiering should be treated in a different manner from subsequent customer changes in service.

g. Implementation and Enforcement.

i. Statutory Requirements

79. The Cable Act requires that our regulations regarding basic service rates include procedures for implementation by cable operators, for enforcement by franchising authorities, and for our expeditious resolution of disputes between cable operators and franchising authorities. We must also establish regulations to assure that subscribers are informed that basic service, as defined in Section 623, is available to them and that a cable operator notify franchising authorities 30 days in advance of any proposed increase in rates for the basic service tier.[111]

ii. Discussion

80. We seek comment on an expeditious way to trigger initial review of a cable operator's current basic tier rate once a local franchising authority has been certified to regulate those rates. One alternative would be to require that the operator file its schedule of basic tier rates with the franchising authority within a relatively brief period, *e.g.*, after receiving notice[112] from the authority that it has been certified by this Commission. Under this alternative, the authority would have a relatively brief period, but one still permitting meaningful review, to consider the schedule. Upon expiration of this time, the rates would be presumed reasonable absent a negative finding. This would be analogous to our procedures for reviewing common carrier tariffs, which must be completed within 120 days.[113] We believe the same deadline should apply to review of both an operator's initial filing and any later-filed proposed rate increases and service changes that involve rate increases. Without such a deadline, a franchising authority could by inaction delay new services reaching the public and deny a reasonable price change which could be critical to an operator's ability to serve the community. We seek comment on this proposed approach.

81. Section 623(b)(6) requires 30 days' notice of proposed increases in basic service rates.[114] We might infer from this language not only that a franchising authority is expected to review rate increases, but also that if the authority does not render a decision within this period, the proposed increase would automatically become effective. We observe that Section 623(a) requires that basic tier rate proceedings provide a reasonable opportunity for consideration of the views of interested parties. It would be difficult for interested parties to file and the local authority to consider their pleadings all within a 30-day period. Thus, we seek comment on whether an additional period of time should be granted for a franchising authority to review proposed rate increases and, if so, what time period would best balance the need for expedition with the need to render an informed and judicious rate determination.

Congress intended for there to be a single basic service tier that the subscriber must purchase as a precondition of ordering other programming. We tentatively conclude here that rules adopted pursuant to Section 623(b)(5) should apply to any changes in service tiers after installation of initial service regardless of whether we adopt a final conclusion that Congress intended for there to be a single basic service tier that the subscriber must purchase as a precondition of ordering programming.

[109] Communications Act § 623(b)(5)(C), 47 U.S.C. § 543(b)(5)(C).

[110] We solicit comment on whether Congress intended for Section 623(b)(5) to apply to changes in equipment generally or only to changes in equipment associated with changes in service tiers.

[111] Communications Act, §§ 623 (b)(5),(6), 47 U.S.C. §§ 543(b)(5),(6).

[112] *See supra* para. 24.

[113] 47 C.F.R. § 61.58, 47 U.S.C. § 203(b)(2).

[114] Communications Act, § 623(b)(6), 47 U.S.C. § 543(b)(6).

82. Another alternative would be to establish relatively brief notice periods (*e.g.*, 60 or 90 days) after which an increase would become effective unless a franchising authority had rejected it, but also to allow for the tolling of the franchising authority's deadline in particular circumstances. For example, the deadline might be suspended for complex cases where the franchising authority needs additional information from the cable operator before it can render a decision. The disadvantage to this second alternative is that it might deprive the public of new services and the operator of a reasonable price increase for long periods of time. We also observe that in some areas, a franchising authority's rate determination may be subject to review by a higher level of local or state authority, further delaying a final determination.

83. A third possibility, therefore, might be to permit rate increases to go into effect automatically after the 30-day notice period expires, subject to refund if the franchising authority ultimately determines the increase to be unjustified. This alternative would permit ample time for interested parties to present their views. It could, however, undercut the intent of Congress -- as expressed in the legislative history of the Act -- to protect consumers' interests against potentially unreasonable rate increases.[115] We seek comment on these various alternatives, on any others commenters suggest for implementing basic tier rate regulation, and particularly on the time constraints that should govern determinations on proposed rate increases. We also seek comment on whether, depending on the ratemaking methodology adopted, certain price changes caused by factors outside the operator's control, *e.g.*, increases in taxes or programming costs, should not be deemed price "increases" subject to the notice requirement, and should be permitted to be passed through without prior regulatory review. Those advocating such an approach should fully discuss its relationship to the ratemaking methodology they recommend.

84. We seek comment on how to achieve expedition in ratemaking procedures while at the same time ensuring that all parties receive the due process to which they are entitled. To ensure that interested parties have an adequate opportunity to comment, we propose to require that an operator notify subscribers in writing of a proposed rate increase at approximately the same time it notifies the franchising authority, *i.e.*, at the billing cycle closest to 30 days before any proposed increase is effective. We also propose to permit any interested parties, including subscribers, to participate in the local authority's ratemaking decisions.[116] We seek comment on this proposal, on what the appropriate pleading cycle might be, and on how such a cycle could be harmonized with the statutory goal that disputes between cable operators and franchising authorities be resolved expeditiously. We ask whether we should require the operator, for its initial filing and any subsequently proposed rate increase, to show that its submission complies with Section 623 and our implementing regulations. Placing the burden of demonstrating compliance on the operator could expedite decision-making, as the operator possesses the factual information necessary for such a demonstration.

85. Given the statutory emphasis on expedition, we do not propose to provide for formal hearings on proposed rate increases or rate-related disputes. We also propose to require the authority to issue written decisions explaining its disposition of each rate increase request. We propose also to adopt rules allowing local authorities to obtain additional information from operators requesting a rate increase and to establish proprietary information procedures analogous to those proposed below for cable programming service complaints. We seek comment on these tentative conclusions and proposals. We also ask interested parties to comment on what oversight procedures franchising authorities may need to ensure compliance with the Cable Act.

86. When franchising authorities regulate rates for basic cable service consistent with the Act, they would be in the best position to monitor an operator's compliance with our rate regulations. Consequently, we tentatively find that enforcement of cable regulation should occur at the local level in these circumstances. We seek comment on whether a franchising authority has the power under the Cable Act, if it denies a rate increase, to set a rate for basic cable service itself, or whether formulation of a new rate should be left to the cable operator. We also seek comment on whether, in the event an operator should fail to comply with a rate decision, the Cable Act gives an authority the power to order refunds, or whether the authority must obtain an order from a court or other governmental entity with the power to order refunds. In order to obtain a refund, would an authority have to employ special procedures to ensure that the due process rights of an operator were not violated?[117] We also seek comment on what forms of relief would be available under local law. For those authorities with franchise agreements that do not provide for rate regulation, could franchise agreements be revoked or not renewed for lack of compliance with rate decisions? We seek comment on whether other remedies, such as fines, would be available under state or local law. We also seek comment on whether the FCC could impose forfeitures upon cable operators failing to comply with local authorities' determinations that were consistent with our basic service rate regulations.[118]

87. We invite interested parties to comment on the appropriate forum for appeals of local authorities' rate decisions. One approach would be to rely on the local courts, and not this Commission, to resolve what is essentially a local dispute between an operator or subscriber and a franchising authority. An alternative would be for this Commission to resolve such disputes. This approach might assure a more uniform interpretation of the standards and procedures adopted pursuant to the Cable Act. We seek comment on these alternatives. In particular, we ask whether the jurisdictional framework of the Cable Act permits us to exercise jurisdiction over an authority's rate regulation decision in the absence of our disallowing or revoking its certification.[119]

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[115] *Se e* House Report at 82.

[116] The Act requires franchising authorities to certify that their rate regulation procedures "provide a reasonable opportunity for consideration of the views of interested parties." Communications Act, ¥ 623 (a)(3)(C), 47 U.S.C. § 543 (a)(3)(C).

[117] *See infra* para. 109.

[118] 47 U.S.C. § 503(b)(2).

[119] *See supra* paras. 15-16.

88. We also seek comment here on whether, when we assert our jurisdiction in cases of revocation or disallowance, we should apply the same procedures to basic service rate petitions as those we would apply to cable programming services complaints;[120] whether we should apply procedures more closely analogous to those proposed for local franchising authority's regulation of basic service rates; or whether some combination of the two would be most appropriate.

89. The Cable Act also requires that we establish rules to assure that operators inform subscribers that a basic service tier is available. [121] We tentatively conclude that we should require the operator to give initial written notice of basic tier availability to existing subscribers within 90 days or three billing cycles from the effective date of our rules governing cable rates. Additionally, we propose to require operators to notify subscribers in any sales information distributed prior to installation and hook up and at the time of installation.[122] We seek comment on this proposal. We also seek comment on the appropriate format and content of any such notice.[123] In addition, we seek comment on any other means by which we can ensure that subscribers receive meaningful notice of basic tier availability.

4. Regulation of Cable Programming Services

a. Regulations Governing Rates

i. Statutory Requirements

90. The statute requires that the Commission establish criteria for identifying, in individual cases, rates for the acquisition and distribution of cable programming services that are unreasonable.[124] The statute provides that in establishing such criteria the Commission must consider:

(1) rates for similarly situated systems taking into account similarities in costs and other relevant factors;

(2) rates of systems subject to effective competition;

(3) the history of rates for the system including their relationship to changes in general consumer prices;

(4) the systems' rates as a whole for all cable services;

(5) capital and operating costs of the system; and

(6) advertising revenues.[125]

The statute also permits the Commission to consider other relevant factors.[126]

ii. Discussion

91. We tentatively conclude that the statute intends for the Commission to establish criteria to govern the determination in an individual case of whether rates for cable programming service are unreasonable based on a reasoned balancing of the factors enumerated in the statute and other factors that the Commission in its discretion may choose to consider. We tentatively conclude that the statute affords the Commission substantial discretion in establishing these criteria. We solicit comment on this analysis and on whether we should give any of the statutory factors primary or greater weight than others.[127] We also solicit comment on what factors other than those enumerated in the statute we should consider in establishing the criteria called for in the statute.

92. We have already described regulatory approaches and alternatives that could be adopted to govern rates for the basic service tier. With the exception of the "Direct Costs of Signals/Nominal Contribution to Joint and Common Costs" alternative, all could also be used to determine in individual cases whether rates for cable programming service are unreasonable.[128] For example, a benchmark based on the rates for cable programming service of systems subject to effective competition could be used in an individual case to judge whether the rates of the system are unreasonable: if they were higher than the benchmark they would be presumed unreasonable. We believe that the advantages and disadvantages of the regulatory approaches and alternatives that we discussed for basic tier service are equally applicable to cable programming service.[129] As with the basic service tier, we tentatively conclude that tradi-

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120 *See infra* paras 97-110.

121 Communications Act, § 623(b)(5)(D), 47 U.S.C. §543(b)(5)(D).

122 *See generally* 47 C.F.R. Section 76.66(c) (under now obsolete A/B switch rules, information on availability of switch required by date certain, at time of installation, and annually thereafter.)

123 *See generally,* 47 C.F.R. Section 76.66(c)(describing information which notice of A/B switch availability must contain.)

124 Communications Act, § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A).

125 Communications Act, § 623(c)(2), 47 U.S.C. § 543(c)(2).

126 Communications Act, § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A).

127 The statute requires the Commission to establish regulations that assure that rates for the basic service tier are reasonable, whereas for cable programming services we must establish standards that permit identification in individual cases of rates that are unreasonable. We solicit comment on whether this difference in statutory language creates a different standard of reasonableness for the basic service tier and for cable programming services. We ask whether our regulations identifying unreasonable cable programming services rates will necessarily define the "reasonable" rates for such services as well and, therefore, whether Congress instead intended more of an "egregious" standard for cable programming services. We solicit comment on the extent to which our regulations should produce lower rates for higher tier services than those generally in effect at the time of enactment of the Cable Act of 1992. If so, we solicit comment on what balancing of the statutory factors for cable programming services would accomplish that result.

128 The "Direct Costs of Signals, Nominal Contribution to Joint and Common Costs" approach is not feasible for tiers higher than the basic tier. Requiring only a nominal contribution to joint and common costs from higher tiers would require the cable operator to seek a larger contribution from the basic tier, or from the premium channels and/or pay-per-view. Larger contributions to overhead from pay-per-view, with its smaller unstable subscriber base, would threaten the operator's ability to recover operational costs or any reasonable profit. Requiring larger contributions from the basic tier would conflict with congressional intent that rates for the basic tier be kept low. *See* Conference Report at 63.

129 We previously asked what customer equipment, if any, Congress intended to include within the definition of cable programming services. *See* para. 65, *supra*. If such equipment is not subject to regulation pursuant to Section 623(b)(3) as equip-

tional cost-of-service regulation would not be the best alternative to select as the primary method of regulating rates for cable programming services. We seek comment on this tentative conclusion and on which alternatives we should incorporate in the comprehensive plan we will adopt for regulating cable programming service rates. Parties suggesting modifications to proposed alternative or different alternatives to those discussed above should explain how their proposal better meets the objectives set forth in the Cable Act of 1992 in general and Section 623(c) in particular.

93. We posed many questions about each of the alternatives presented in the subsection discussing basic tier rate regulation. Those questions were designed to identify the optimal regulatory structure for assuring reasonable rates for basic tier service. We ask commenters to indicate whether their answers to those questions would be different if a given alternative were being applied to cable programming service. We additionally ask how each alternative could be implemented if a cable operator had more than one tier of cable programming services. Also, we ask commenters to discuss which combination of alternatives for regulating the basic tier and for cable programming services will best serve statutory objectives.

94. We are aware that we must balance (a) the need to ensure that cable rates are not reasonable and do not include monopoly rents, against (b) the need to ensure that cable systems earn a reasonable return so that they can continue to attract capital necessary to operate and to expand the services they provide to their subscribers. To the extent that local or state regulation of basic rates constrains the revenue and profits obtained from the basic tier, cable operators may seek to earn relatively more revenue and higher profits on their programming services beyond the basic tier. Hence, there may be a tradeoff between the severity of the restrictions that may be placed on basic tier rates and rates for other programming services. We seek comment on whether we will be confronted with such a tradeoff and, if so, how it can best be made in our cable rate regulations. In particular, we solicit comment on the extent to which regulations designed to produce low rates for the basic service tier require permitting relatively higher rates for cable programming services.[130] We also solicit comment on what combination of rate regulations applicable to the basic service tier and cable programming services would best promote statutory objectives. Can our regulations be designed to produce low rates for both the basic service tier and cable programming services? Should our regulations intend that cable systems recover most costs and earn most profits from per channel and per event programming?

95. The Cable Act defines "cable programming service" as

> any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.[131]

Thus, cable programming service encompasses all video "tiered" programming, other than that included in the basic service tier, and would exclude all pay-per-channel or per-program material. As noted in the legislative history of the Cable Act, some cable systems are "experimenting with 'multiplexing' -- the offering of multiple channels of commonly-identified video programming as a separate tier (*e.g.*, HBO1, HBO2 and HBO3)." The House Report states that Congress intended for these "'multiplexed' premium services to be exempt from rate regulation to the same extent as traditional single channel premium services when they are offered as a separate rate tier or as a stand-alone purchase option."[132] We thus propose to exclude from the definition of "cable programming service," pay-per-channel or pay-per-program services offered on a multiplexed or time-shifted basis. We seek comment on whether, for a tiered offering of a multiplexed premium service to be exempt from rate regulation, the multiple channels offered would have to consist of essentially the same programming offered on a time-shifted basis. We also ask interested parties to comment on how we should define "same programming" for purposes of any such exemption.

96. We also seek comment on the circumstances under which a tier consisting of different premium services, could be subject to rate regulation. If such a tier were offered at a single package price, as opposed to separate charges for each channel, would it automatically be subject to regulation? Would this be so even if the package price were the sum of the charges for each separate channel added together? Assuming that we were to exempt such premium tiers from regulation, does the Cable Act nevertheless require us to regulate the rates of any premium tiers offered at either a discount from, or an added charge to, a price composed of the separate charges for each individual channel?[133] To what extent did Congress intend that imposition of rate regulation would influence or limit an operator's discretion to arrange its services in tiers?

b. Complaint Procedures; Rate Reduction and Refund Procedures for Rates Found to be Unreasonable

i. Statutory Requirements

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ment used by subscribers to receive the basic service tier, we ask whether the Act contemplates any regulations applicable to such equipment beyond those applicable to cable programming services generally. In particular we seek comment on whether we should adopt uniform rules to govern regulation of rates for equipment used to receive the basic tier and for equipment falling within the definition of cable programming service.

130 *See* discussion at paras. 31-32, *supra*.

131 Communications Act, § 623 (l)(2), 47 U.S.C. § 543 (l)(2).

132 House Report at 80.

133 We address here the scope of the rate regulation provisions of the Cable Act as they relate to the "packaging" of premium channels. We observe that related issues are raised by the Act's prohibition on discrimination in the anti-buy-through provisions of the statute. Communications Act, § 623 (b)(8)(A), 47 U.S.C. § 543 (b)(8)(A); *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking*, MM Docket No. 92-262, FCC 92-540 (released Dec. 11, 1992). We ask interested parties to comment on the interrelationship between these statutory provisions and to suggest a unified approach that would be consistent with the Act's objectives.

97. The Cable Act requires that we establish "fair and expeditious procedures" for receiving, considering and resolving complaints from "any subscriber, franchising authority, or other relevant State or local government entity" alleging that rates for cable programming services are unreasonable pursuant to our rules. The statute specifically states that we must specify the minimum showing required for a complaint to obtain Commission consideration and resolution.[134] A complaint is timely only if filed during the 180-day period following the effective date of our regulations governing unreasonable rates for cable programming services or, thereafter, within a reasonable period of time after the cable operator changes its rates. This time constraint on filing complaints also applies to complaints concerning changes in rates that result from changes in the system's service tiers.[135]

ii. Discussion

98. The legislative history indicates that Congress intended our regulations not to be "so technical or complicated as to require subscribers to retain the services of a lawyer to file a complaint and obtain Commission consideration of the reasonableness of the rate in question."[136] We thus plan to devise procedures that are not only fair to all parties, but are also simple and expeditious.

99. One alternative is to require that complaints concisely state facts showing how an operator has violated ourx6 rate regulations. We recognize, however, that the ratemaking methodology we adopt, even if very simple, may not be readily accessible to the ordinary subscriber. In addition, the legislative history indicates that Congress deliberately excluded the requirement that a complaint demonstrate a "prima facie case".[137] Thus, if we adopted this requirement, where a subscriber's complaint failed to conform, instead of dismissing it out of hand, we might send the subscriber an informational letter describing what a complaint should state and permit refiling within a set period (for example, 30 days). The filing of the first complaint would serve to toll the time limit on complaints, which we discuss below. On the other hand, although rigorous technical requirements should not be imposed, this Commission and cable operators need assurance that our procedures permit only genuine allegations of illegal rates to go forward and do not permit complaints that are frivolous or lack any serious substantive allegation to proceed.

100. A second alternative, therefore, is to set an even simpler standard for a subscriber complaint, and to make this a minimum standard which would have to be met in order to avoid dismissal. For example, a subscriber might be required to allege that cable rates have risen unreasonably within a given period and give the specific range of rates and years involved. The complaint would have to allege that the complainant was a subscriber of a cable system named in the complaint, and also state the name of the franchising authority. The simplicity of this second approach would facilitate the filing of subscriber complaints. We observe that if a relatively straightforward benchmark approach is adopted, requiring a subscriber to state facts showing that rates were above the benchmark might be a simple minimum standard that a layman could easily meet. It is also conceivable, however, that use of a minimum standard of sufficiency for complaints might not give a cable operator sufficient notice of the precise claims made and might place greater demands on Commission staff seeking to determine the issues and resolve the dispute. Should a benchmark alternative for rate regulation not be adopted, or should a benchmark not prove workable as a procedural standard, use of some other minimal standard might also not adequately screen frivolous or unsubstantiated complaints. We seek comment on these alternatives for defining the minimum showing required for substantive complaints. We also invite additional suggestions.

101. Interested parties are also asked to comment on specific forms or language that might be standardized for use by subscribers in filing rate-related complaints. We also ask for comment on how such standardized information might be made widely available. For example, should it be given to local franchising authorities for local distribution? We also seek comment on whether complaints filed by franchising authorities or parties represented by counsel could or should be held to a different pleading standard and, if so, what that standard should be.

102. The difficulties that ordinary subscribers may face in drafting complaints may make it advisable to enlist the franchising authorities' expertise in this process. Having a franchising authority provide a statement or decision concerning the alleged violation as part of a subscriber's complaint might facilitate the drafting of the complaint, provide better notice to a cable operator of the allegations, and expedite resolution of the dispute. In cases where a refund is ordered to a class of subscribers,[138] the concurrence of the local franchising authority would help ensure that an individual complaint was truly representative of the class. It might also ensure that our resolution of a cable programming service rate dispute did not undermine the franchising authority's regulation of basic cable service rates. This could otherwise occur, for example, if a different ratemaking methodology were applied to basic and cable programming services. We thus seek comment on whether subscribers should be permitted, or required, to obtain a franchising authority's decision or concurrence as a precondition to the filing of a valid complaint. Parties advocating that such a decision or concurrence be required are asked to reconcile such a requirement with the amendment incorporated in the Cable Act which specifically permits subscribers, as well as franchising authorities and other relevant local and state governmental entities, to file complaints.[139]

103. We propose to require that all complaints be served on both the cable operator and the franchising authority by the complaining parties. After a complaint is served, an operator would have a reasonable period of time in which to file a response, *e.g.*, 15 or 30 days. Based on the complaint and response, we would make a determination of whether a complainant had made a minimum showing to

[134] Communications Act, § 623 (c)(1)(B), 47 U.S.C. § 543 (c)(1)(B).
[135] Communications Act, § 623 (c)(3), 47 U.S.C. § 543 (c)(3).
[136] Conference Report at 64.
[137] Conference Report at 64.
[138] *See infra* para. 108.
[139] Communications Act, § 623 (c)(1)(B), 47 U.S.C. § 543 (c)(1)(B); Conference Report at 64.

permit the case to go forward. We thus would look to both the complaint and response before deciding whether there was a minimum showing to allow the complainant to proceed. This would 8appear to be consistent with Congressional intent that a complaint not be required to demonstrate a prima facie case.[140] Once we had determined, based on a review of the two documents, that a minimum showing of a violation of our rules had been established, we would issue an order asking for further information from the operator and setting a further pleading schedule, if necessary. At this point the operator would have the burden of producing evidence to disprove the allegations. This alternative should prove expeditious and easy for nonlawyers to use. As the cable operator is likely to be the party in possession of the data necessary for a resolution of the dispute, placing the burden on the operator once a minimum showing has been made appears reasonable and consistent with the statute. We also observe that if we adopted a benchmark model for regulation, if an operator could simply show that its rates were within the benchmark, it would be able to avoid extensive showings related to costs and other factors that might justify an above-benchmark rate. We seek comment on these tentative conclusions and proposals. In particular, we ask interested parties to comment on what the appropriate pleading cycle should be, taking into account the statute's dual objectives of expedition and fairness.

104. Alternatively, we seek comment on whether we should automatically require that cable operators answer complaints that we have determined are in good faith and raise a genuine substantive issue. Under this approach, a cable operator would not be required to respond automatically to all complaints. Rather, we (or the subscriber) would notify the operator of a complaint after it had been initially reviewed by Commission staff and found to meet our minimum showing.[141] In this connection, we observe that under a benchmark approach, an operator would be required to respond only if the allegations were that rates were outside the benchmark.

105. The Cable Act provides that, with one exception, our procedures for cable programming service complaints shall be available only to those filing within a "reasonable period" after a change in rates, including a change resulting from a tiering change.[142] We tentatively find that a time limit of 30 days from the time that a subscriber received notification of such a rate change would provide adequate opportunity for a subscriber to formulate a complaint under the simplified procedures we contemplate. We seek comment on whether this would be a reasonable period of time within the meaning of the statute. We also ask for comment on whether we should allow an additional 30 days if we require the concurrence of a franchising authority for the filing of a complaint as discussed above. Section 623 (c)(3) excepts from the "reasonable period of time" requirement complaints filed within 180 days following the effective date of our regulations concerning cable programming service rates. Thereafter, subscribers and other interested parties will have become familiar with our new regulations. We thus interpret this exception to permit subscribers to complain of any cable programming service rates within that 180-day period, regardless of when those rates were initially effective. Although we would be able to rollback prospectively any such rates in violation of our rate regulations, we do not believe that we would be able to order refunds for unreasonable rates in effect prior to the effective date of our regulations. After this 180-day period passes, subscribers would be held to the 30-day time limitation. We seek comment on these tentative conclusions.

106. We also seek comment on how to treat information which may be necessary to a decision, but which the cable operator regards as proprietary. Our existing rules authorize the withholding of trade secrets or confidential financial or commercial information from routine disclosure to the public.[143] As a general matter, however, we believe the burden should be firmly on the cable operator involved to demonstrate that significant competitive injury might result from any disclosure of information used in the rate regulation process and that as full a disclosure as is reasonably possible should be mandated. We seek comment on whether our existing rules would be adequate in a cable rate dispute, and whether they are sufficiently flexible to permit an opposing party to have access to the information necessary for its case. In particular, we also ask whether we should devise procedures permitting the parties to a dispute limited access to proprietary information in specific cases, and in what cases such limited access would be appropriate. Should we permit an operator to redact confidential information in the first instance, with Commission staff retaining the ability to seek further information if necessary? In such cases, should we confine distribution of such information to designated representatives of parties and Commission staff? We also invite comment on the types of information relevant to a cable rate determination which would likely be considered proprietary by any of the parties involved and, in particular, on any special problems that may arise from use of data proprietary to third parties.

107. Once a decision is made, we seek comment on what types of relief are available. We assume that our authority under the Cable Act to prevent unreasonable rates at a minimum authorizes us to order prospective reductions of rates we have found to be unreasonable. We propose to require operators to make such reductions promptly, for example within 30 days of a Commission decision finding existing rates unreasonable. We seek comment on this tentative conclusion and proposal. In addition, we ask interested parties to comment on whether our ability to order prospective rate reductions would extend to prescription of specific rates.

108. We tentatively find that our authority under Section 623 (c)(2)(C) permits us to reduce rates determined to be unreasonable and to refund to subscribers the portion of such rates found to be unreasonable that subscribers paid after the filing of a complaint. We propose in the first instance to determine the amount of overcharge and to order a refund to the actual subscribers who paid this overage. It may, however, be administratively infeasible or unreasonably burdensome to determine the actual subscrib-

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[140] Conference Report at 64.
[141] *See supra* para 100.
[142] Communications Act, Section 623 (c)(3), 47 U.S.C. § 543 (c)(3).
[143] 47 C.F.R. § 0.457 (d).

ers who paid the unreasonable rate. In such cases, we propose to order a prospective percentage reduction in the unreasonable service rate to cover the cumulative overcharge, and to have that reduction made in the bills sent to the class of subscribers that had been unjustly charged. This reduction would be in addition to the rate reduction necessary to eliminate prospective overcharges, and would end when compensation for the overcharge had been made. We interpret our authority under Section 623(c) as permitting us to reduce rates for the class of subscribers who paid for a service the rate for which was determined to be unreasonable, even if this finding was based upon a complaint filed by a single subscriber. We believe that this construction is necessary to fulfill the purposes of this statutory provision. We seek comment on these tentative findings and proposals.

109. In keeping with Congressional intent, we envision the above-described procedures as operating simply and informally. At the same time we intend to fashion them so as to safeguard the due process rights of all participants.[144] We seek comment on how best to devise procedures that will effectuate these objectives. One option would be to treat cable programming service complaints as informal adjudications and apply the streamlined procedures outlined just above. If this option were adopted, would it also be advisable to adopt relaxed (*e.g.*, permit but disclose) *ex parte* rules to facilitate staff resolution of a dispute in which presumably non-lawyers were participating? Another approach might be to style cable programming services complaints as ratemaking proceedings, using procedures analogous to those followed in our tariff review process.[145] These procedures would be the sole means by which the Cable Act empowers us to regulate cable programming service rates and determine liability for overcharges on a prospective basis only (from the time the complaint was filed). They thus reasonably could be analogized to ratemaking proceedings. Under this option, we would also consider cable programming service proceedings to be nonrestricted proceedings under our *ex parte* rules, subject to "permit but disclose" *ex parte* obligations.[146] This approach would give Commission staff maximum flexibility to gather relevant information, flexibility particularly helpful in disputes where one or more parties were not represented by counsel. This approach thus also serves our objective of crafting procedures which do not require parties to have professional representation. We seek comment on our proposed complaint procedures and on whether they would adequately accommodate the various policy objectives and legal constraints just articulated. Should it be necessary to establish more formal proceedings in cases involving factual disputes or potential refund liability, we seek comment on how we might accomplish this and still make these proceedings accessible to non-lawyers and to parties located in areas distant from Commission offices in Washington, D.C. We also seek comment on whether alternative dispute resolution would be one possible solution, should the parties agree to employ it.[147]

110. Once relief is ordered, we must ensure that our decision is properly effectuated. We seek comment on whether operators should be required to certify that they have implemented our decision. We tentatively find that noncomplying operators would be subject to forfeitures.[148] We seek comment on this tentative conclusion and on other remedies such as reporting requirements, that may be appropriate in specific circumstances.

5. Provisions Applicable to Cable Service Generally

a. Geographically Uniform Rate Structure.

i. Statutory Requirements

111. The Cable Act of 1992 requires cable operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."[149]

ii. Discussion

112. In accordance with the above provision of the Cable Act, we propose to incorporate into implementing regulations a provision that cable systems must have a uniform rate structure throughout the geographic area served by the cable system. We solicit comment generally on the extent to which cable operators' ability to establish service categories with separate rates and terms and conditions of service is limited by the requirement for a geographically uniform rate structure. We also seek information on the extent to which cable operators currently enter into special service arrangements with some customers or types of customers, such as long-term service contracts with certain types of customers (educational and medical institutions, large residential communities or buildings) with discounted rates and other special terms and conditions. In addition, we solicit comment on whether cable operators should be afforded the flexibility to establish *bona fide* service categories with separate rates and service terms and conditions.

113. We tentatively conclude that the statutory requirement of a geographically uniform rate structure does not prohibit establishment of reasonable categories of service with separate rates and terms and conditions of service. We tentatively conclude that the requirement for a uniform rate structure should be read in conjunction with the amendments to Section 623(e), which authorize regulatory authorities to prohibit discrimination, but do not require that they do so. We do not interpret the statutory mandate for uniform rate structures as precluding reasonable dis-

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[144] *Cf. Northwestern Indiana Telephone Co. v. FCC*, 824 F. 2d 1205, 1211 (D.C. Cir. 1987) (in complaint over telco-cable affiliation rules, due process did not require an evidentiary hearing where there was no material issue of fact). *But cf. Connecticut Office of Consumer Counsel v. FCC*, 915 F. 2d 75, 81 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991) (upholding decision not to hold hearing on complaint brought pursuant to 47 U.S.C. § 208).

[145] *See, e.g.*, 47 C.F.R. Part 61.

[146] 47 C.F.R. § 1.1206.

[147] *See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission Is a Party*, 6 FCC Rcd 5669 (1991) (committing the Commission to the use of ADR techniques to expedite and improve its administrative process whenever feasible and consistent with our statutory mandate).

[148] 47 U.S.C. § 503(b).

[149] Communications Act § 623(d), 47 U.S.C. § 543(d).

criminations in rate levels among different categories of customers provided that the rate structure containing such discriminations is uniform throughout a cable system's geographic service area. Such categories of customers with different rate levels might include, for example, those specifically identified in Section 623(e) -- senior citizens or other economically disadvantaged groups. We reach this conclusion notwithstanding some language in the legislative history suggesting that rates should be uniform throughout the geographic service area.[150] We solicit comment on this conclusion.

114. We seek comment on the meaning of the term "geographic area" as used in this section of the Act. One possible interpretation is that Congress intended this phrase to mean a franchise area. Lending support to this interpretation, the legislative history indicates that Congress was concerned about cable operators having different rates within a franchise area.[151] We recognize, however, that many cable systems provide service for more than one franchise area. If Congress intended to limit the meaning of geographic area to a franchise area, it could have used the less ambiguous term. In addition, if the meaning of geographic area is limited to a franchise area, Section 623(d) of the Communications Act would be duplicative of Section 623(e); different rate structures within a franchise area could be prevented by antidiscrimination rules.

115. If the Commission assumes that geographic area refers to an area greater than a franchise, the Act appears to limit the region to the contiguous area served by the cable system. Under this more inclusive interpretation, we would require a uniform rate structure throughout a cable system. This might cause problems under a cost-of-service alternative for regulating cable services because different franchises within a system could have differing costs. For example, costs may vary due to differing franchise fees, density of homes passed, the age of facilities, or many other factors. We request comment on whether Congress intended to require or to permit cross-subsidization to maintain uniform rates within a cable system. We solicit comment on the advantages and disadvantages generally of interpreting geographic area as synonymous with franchise area or as referring to a greater area. We solicit comment on our discretion to adopt these different interpretations.

b. Discrimination.

i. Statutory Requirements

116. The Cable Act permits local and federal authorities to prohibit discrimination in provision of cable service, except that (1) cable operators may establish reasonable discounts for senior citizens or other economically disadvantaged groups,[152] and (2) local and federal authorities may regulate installation or rental of equipment for the hearing impaired.[153]

ii. Discussion

117. Based on this provision, we tentatively conclude that we should explicitly permit the discounts contemplated in the statute. Local authorities would also be free to adopt anti-discrimination provisions consistent with the statute and our implementing regulations. We seek comment on these tentative conclusions. We seek comment in particular on whether differences in rates among different classes of customers based on differences in costs of providing services should not be prohibited under this provision. We also seek comment on what economically disadvantaged groups other than senior citizens may be awarded reasonable discounts by cable operators. The Act does not preclude authorities from adopting regulations concerning equipment and installation which facilitate reception by the hearing impaired that are consistent with other provisions of the Cable Act. We seek comment on whether there is any need at this time to adopt specific rules at the federal level as well.

c. Negative Option Billing.

i. Statutory Requirements

118. The Cable Act provides that an operator may not charge a subscriber for "any service or equipment that the subscriber has not affirmatively requested by name." The Act further provides that a subscriber's failure to refuse a proposal to provide such service or equipment "shall not be ?deemed to be an affirmative request for such service or equipment.[154] The legislative history indicates that Congress did not intend this Section to apply to "changes in the mix of programming services that are included in various tiers of cable service."[155]

ii. Discussion

119. We interpret this provision to mean that, in order to be billed for any cable service (either tiers or individually priced programs or channels) or equipment, a subscriber previously must have affirmatively requested that particular service or equipment. A cable operator may not take a subscriber's inaction following the operator's proposal to provide such service or equipment as an affirmative request for the same. We tentatively conclude that an affirmative request for service or equipment may occur orally or in writing so that subscribers are given flexibility to order by either method. We also tentatively conclude that an operator should not be permitted to charge for any service or equipment provided in violation of Section 623(f) of the Act and our implementing rules.[156] We seek comment on this tentative conclusion. It would appear that under such a regime, subscribers that had been charged in violation of our rules would simply not pay the illegal

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[150] Senate Report at 76. The Conference Report says that § 3(d) of the Cable Act was taken directly from the Senate version of the bill. Conference Report at 65. It also would not prohibit promotional rates or differences among rates charged seasonal and full-year customers *per se*. The reasonableness of such rates would, however, still turn on operators' compliance with the substantive ratemaking standards we ultimately adopt.

[151] Senate Report at 76.

[152] Communications Act, § 623(e)(1), 47 U.S.C. § 543(e)(1).

[153] Communications Act, § 623(e)(2), 47 U.S.C. § 543(e)(2).

[154] Communications Act, § 623(f), 47 U.S.C. § 543(f).

[155] Conference Report at 65.

[156] *See generally* 39 U.S.C. § 3009 (b) (stating that unordered merchandise may be treated as a gift by the recipient);

charge, with the onus on the cable operator to attempt to collect through the local judicial process. We thus seek comment on whether disputes between the operator and subscriber arising under this provision would primarily be subject to resolution in the local courts. This remedy would be in addition to the forfeiture provisions applicable to the operator that fails to comply with Section 623 (f) and our implementing rules.[157] We remain concerned, however, that our enforcement procedures be adequate to correct any practices or patterns on the part of operators that violate our rules, and seek comment on how we can ensure our ability to do so.

120. The legislative history states that Section 623(f) does not apply to "changes in the mix of programming services that are included in various tiers of cable service."[158] We seek comment on the types of tier changes that may be made without violating the negative option billing restriction and whether such tier changes must be revenue neutral. Can they involve additions or deletions of services? We tentatively find that a change in the composition of a tier that was accompanied by a price increase justified under our rate regulations would not be subject to the negative option billing prohibition. We believe that this interpretation will avoid an undesirable stalemate in system offerings that could disserve subscribers overall. We also do not believe that Congress intended the negative option billing provision to apply to system-wide upgrades in equipment accompanied by a justified price increase. Otherwise the provision might discourage operators from making beneficial system improvements. We seek comment on these tentative conclusions. However, we also seek comment on whether subscribers should be given notice of such changes. Should we require, for example, that an operator notify subscribers at least 30 days in advance of a change in a system's offering, such as an addition to a tier or an equipment upgrade, accompanied by a price increase? We also seek comment on the interplay between the negative option billing provision and the prohibition on evasions set forth in Section 623(h).[159]

121. We also seek comment on how this provision should apply to initial implementation of the basic cable service rate structure. For example, an operator may have been offering a basic service consisting of more channels than are now required under the Cable Act's definition of basic service. It may now effectively be required to split its former basic service into the Act's formulation of basic service and an expanded basic tier. If some subscribers do not affirmatively request both basic and expanded basic, we seek comment on whether the operator may nevertheless continue to bill them at the old rate. What if the operator has also changed the rates?

d. Collection of Information.

i. Statutory Requirements

122. The statute requires cable operators to file annually with the Commission or franchising authorities, as appropriate, beginning one year from the date of enactment, such financial information as is necessary to administer and enforce rate regulation.[160]

ii. Discussion

123. In this NPRM we have proposed several alternatives for implementation of Section 623 of the Communications Act as amended by the Cable Act of 1992. The information that regulators will need to assure that they can effectively administer and enforce the requirements of Section 623 will be determined by the alternative that we ultimately adopt. In order to assure that we can adopt a collection of information requirement that will permit effective administration and enforcement of Section 623, we are proposing to collect on an annual basis the information specified in Appendix C and the information collected by the Commission in the *Order*, MM Docket No. 92-266, FCC 92-545, adopted December 10, 1992. We will also need to collect information concerning rates of systems subject, and not subject, to effective competition to enable us to publish the annual reports on average prices required by section 623(k).[161] This information may be more comprehensive than is necessary to implement some of the alternatives proposed in this NPRM. We intend to tailor the collection of information to the method of implementing Section 623 that we ultimately adopt; less information than that specified in Appendix C may be ultimately required, in any event.

124. We solicit comment generally on the appropriate scope of information that we should collect pursuant to Section 623(k). We solicit comment on the availability of the information specified in Appendix C, on whether cable systems will ordinarily have developed this information, and the burdens that the collection of this information would impose. To the extent this information is not already developed by cable systems, we solicit comment on the extent to which we should require that they develop it, and on time periods that we should permit for its development. We solicit comment on whether we should require the information specified in Appendix C to be submitted by every cable system. Alternatively, we seek comment on whether we should rely instead on a sampling of systems, and, if so, what sampling methodology we should use. While this latter approach could ease administrative burdens, but may not achieve the same degree of accuracy as a more broadly imposed reporting requirement would. We also solicit comment on whether, in order to reduce burdens on systems with 1000 or fewer subscribers, we should require less information, or no information, from such systems.

e. Prevention of Evasions.

i. Statutory Requirements

N.Y.Gen.Bus.L. § 396(2a) (McKinney Supp. 1992) (deeming unsolicited goods, wares or merchandise an unconditional gift to the recipient).

[157] 47 U.S.C. § 503(b)(2) and (6)(B).

[158] Conference Report at 65.

[159] Communications Act, § 623 (h), 47 U.S.C. § 543 (h).

[160] Communications Act, Section 623(g), 47 U.S.C. Section 643(g).

[161] *See* paras. 138-39, *infra*.

125. The Cable Act requires us to promulgate regulations that will prevent evasion of its rate regulation provisions and, specifically, evasions resulting from retiering.[162] The statute requires that we periodically review these regulations.[163]

ii. Discussion

126. We propose generally to prohibit evasion of our rate regulations by cable operators. We propose to allow interested parties to avail themselves of the expedited procedures we establish for rate relief to seek redress of evasions of our rate regulations. We plan to periodically review the standards we establish pursuant to this subsection, with the first review occurring two years from the rules' effective date, and with periodic reviews every three years thereafter. We seek comment on these proposals.

127. As the legislative history contemplates, we propose to prohibit an unjustified increase in rates to subscribers for cable service resulting from retiering that "shift[s] cable programs out of the basic service tier into other packages."[164] At the same time, the Cable Act of 1992 permits, and indeed appears to require in some cases, a restructuring of service offerings.[165] We invite comment on how specifically we can prohibit unjustified rate increases that through retiering might otherwise evade our rate regulation regime. Retiering necessary to comply with basic tier requirements, retiering that did not change the ultimate price for the same mix of channels in issue to the subscriber, or retiering accompanied by a price change that complied with our rate regulations would not be deemed an evasion. We seek comment on this proposal. It is also possible that our substantive rate regulations will lessen the potential for evasions through retiering as well. Should we adopt a parallel rate regulation regime for both the basic tier and Ccable programming services, this uniformity of approach might eliminate the incentive for operators to move services from basic to cable programming services tiers in order to evade rate regulation. We seek comment on the interplay between our substantive rate regulation responsibility and our obligation to adopt rules preventing evasions.[166] We also seek comment on whether we need to establish specific rules regarding evasions of rate regulation through charges for changes in equipment, particularly in light of the specific rules we are adopting regarding such charges.[167] Finally, we seek comment on other specific evasive acts and practices that should be prohibited. For example, we seek comment on whether retiering and repricing of cable services between the effective date of the Act and the implementation of these regulations could, if found to be unreasonable or evasive, raise specific concerns under our proposed enforcement scheme.

f. Small System Burdens.

i. Statutory Requirements

128. The Cable Act requires that we develop and prescribe cable rate regulations that reduce the administrative burdens and cost of compliance for cable systems that have 1000 or fewer subscribers.[168]

ii. Discussion

129. We seek comment on how best to effectuate this statutory requirement. Our current rules exempt operators of cable systems of fewer than 1000 subscribers from certain administrative requirements.[169] We similarly could exempt cable systems of fewer than 1000 subscribers from certain administrative burdens associated with the rate regulations we establish. Depending on the substantive ratemaking standard adopted, we might, for example, exempt small systems from certain accounting requirements or the obligation to submit certain data. With respect to the data collection requirements of the Act,[170] we might rely on external sources of data or, if necessary, special studies instead of requiring individual reports from small systems. We seek comment on this general proposal, as well as on the specific requirements from which small systems might appropriately be exempted. Parties are also invited to comment on other alternatives, *e.g.*, the filing of abbreviated reports or other streamlining of administrative obligations that also might be appropriate. We also seek comment on ways we might coordinate any administrative requirements with the actual operations of small cable systems, *e.g.*, coordinating reporting with systems' billing cycles or internal budgetary processes.

130. We also seek comment on whether we should exempt small systems from any substantive or procedural rate regulation requirements and, if so, which ones. Our current rules exempt small systems from network nonduplication protection requirements,[171] syndicated exclusivity rules,[172] and from certain technical standards and performance testing requirements.[173] A community unit having fewer than 1000 subscribers currently is exempt from the sports broadcast blackout rule.[174] Are there requirements in our proposed rate regulation regime from which small systems may also appropriately be exempt?

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[162] Communications Act, § 623(h), 47 U.S.C. § 543(h).

[163] *Id.*

[164] Conference Report at 65.

[165] *See, e.g.*, Communications Act, Section 623(a)(7)(A),(B), 47 U.S.C. Section 543(a)(7)(A), (B).

[166] The legislative history specifically states that we must adopt regulations to prevent evasions of the "anti-buy-through" provisions of the Cable Act. Conference Report at 65; Communications Act, § 623(b)(8), 47 U.S.C. § 543(b)(8). These provisions are the subject of a separate proceeding and we will consider how to prevent their evasion in that proceeding.

[167] *See supra* paras. 62-71.

[168] Communications Act, § 623(i), 47 U.S.C. § 543(i).

[169] *See, e.g.*, 47 C.F.R. § 76.300 (b) (exempting small systems from maintaining a public inspection file containing records required to be kept regarding political rules, sponsorship identification, EEO performance, and commercial limits in children's programming, signal leakage logs, and repair records).

[170] *See supra* paras. 122-24.

[171] 47 C.F.R. 76.95(a).

[172] 47 C.F.R. § 76.156(b).

[173] 47 C.F.R. § 76.601(e) (exempting systems with under 1000 subscribers which do not use frequency spectrum other than that allocated to over-the-air television and FM broadcasting from testing requirements). *See also* Cable Television Technical and Operational Requirements, 7 FCC Rcd 2021 (1992).

[174] 47 C.F.R. § 76.67 (f). A community unit, as stated *supra* note 36, is a cable system, or portion thereof, operating within a separate and distinct community or municipal entity.

131. In this regard we also seek comment on whether we should establish a presumption that systems with under 1000 subscribers are, because of the underlying costs involved and the small base over which these costs can be spread, unlikely to be earning returns or charging rates that could effectively be altered to the benefit of subscribers through detailed regulatory oversight. There is evidence that small systems tend to have higher costs and to charge lower rates.[175] Under such an approach, a small cable system might be deemed to be in compliance with our rate regulations until it was affirmatively demonstrated -- by a franchising authority in the case of basic service rates or by a subscriber or other interested party in the case of cable programming service rates -- that a small system's rates were unreasonably high. A second option might be to permit small companies to certify their compliance with our rate regulations. A third option might be to tailor our rate regulations specifically to small companies. We might, for example, devise basic cable rate regulations that assure that high-cost small systems will be able to fully recover their costs. We seek comment on these substantive approaches to alleviating regulatory burdens on small systems and on whether they harmonize with the general objectives of the Cable Act.

132. In addition, we tentatively conclude that we should exempt small systems from certain procedural requirements, including, for example, the filing of rate schedules. We seek comment on this tentative conclusion. We might also modify requirements such as burden of proof or information production for small systems in contested cases. We seek comment on such procedural approaches to alleviating regulatory burdens on small systems.

133. Finally, in making some or all of these small system exceptions, should we distinguish between independently owned stand-alone systems of under 1000 subscribers and systems of under 1000 subscribers which are owned by a large MSO? Although the plain language of the statute makes no such distinction, we question whether systems in the latter case need such regulatory protection. A small cable system affiliated with an MSO may enjoy advantages such as program discounts or access to corporate resources that stand-alone small systems do not, and thus may not need the protection Section 623(i) offers. It might also be appropriate to distinguish between larger and smaller MSOs if we distinguished between MSO and independently owned systems. For example, we might distinguish a system directly or indirectly owned by a cable operator that directly or indirectly owns other cable systems, which altogether serve some specific number of subscribers.[176] Parties advocating such an option are encouraged to suggest specific subscriber numbers that might serve to distinguish large from small MSOs. With the exception of the sports blackout rule, the size of a cable system is determined under our current rules according to the number of subscribers served by a single integrated headend.[177] In contrast, the community unit measurement used in the sports blackout rule defines a system in a narrower manner, according to what is essentially the cable franchise area.[178] Use of the single integrated headend might help ensure that what is in practice a large system fully capable of meeting our requirements does not qualify merely because it covers numerous franchise areas, each under 1,000 subscribers. We seek comment on whether either of these two definitions might be appropriately applied in the context of rate regulation of small cable systems. We also ask interested parties to suggest any alternative definitions they believe would be appropriate under the Cable Act. Finally, we seek comment on whether a system's qualifying for small system treatment should be based upon the average number of subscribers over a period of years, rather than the number of subscribers as of a specific date. The former standard would avoid abrupt or frequent changes in regulatory status resulting from seasonal or other brief fluctuations in the subscriber base.

g. Grandfathering of rate agreements.

i. Statutory Requirements

134. The Cable Act provides that the statute and its implementing regulations do not supersede franchising agreements made before July 1, 1990 that authorize regulation of basic cable service rates if there was not effective competition as of that date.[179] The provision states that such agreements are to remain in effect "during the term" of such agreements.

ii. Discussion

135. We tentatively conclude that this provision authorizes a franchising authority with a franchise agreement executed before July 1, 1990, that was regulating basic cable rates at that time to continue regulating basic cable rates for the remaining term of that agreement without certification from this Commission. We tentatively conclude that such franchising authorities (who are not required to apply for certification) should nevertheless be required to notify this Commission that they intend to continue to regulate basic cable rates under the provisions of Section 623(j). This notification will give the Commission information we need to compile the annual reports on average prices required under the Cable Act.[180] We seek comment on these tentative conclusions. We also seek comment on whether an agreement that falls within the terms of Section 623(j) would supersede Commission regulations governing the rates for cable programming services that are not part of the basic tier as defined in the agree-

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[175] *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, Appendix F, Tables 2F and 2H (1990) (average rates of 1-1,000 subscriber system as of 12/31/89 $14.46, compared to $16.75 for systems with over 50,000 subscribers, while average cost per channel to the operator was 90 cents for a 1-1,000 subscriber system and 45 cents for a 50,000-plus subscriber system).

[176] We would propose using our existing attribution rules to determine ownership. *C f. Implementation of Sections 11 and 13 of the Cable Television Consumer Protection Act of 199 2, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations*, MM Docket 92-264 (adopted Dec. 10, 1992) (discussion of using current attribution rules for determining horizontal ownership).

[177] *See* 47 C.F.R. § 76.5(a).

[178] *See* 47 C.F.R. § 76.5(dd).

[179] Communications Act, § 623(j), 47 U.S.C. § 543(j).

[180] Communications Act, § 623(k), 47 U.S.C. § 543(k).

ment and thus not subject to regulation under the agreement. We also seek comment on how franchising authorities now regulating rates and not covered by the grandfathering provision just discussed should make the transition to rate regulation under our new rules.

h. Reports on Average Prices.

i. Statutory Requirements

136. The statute requires the Commission to publish annual statistical reports comparing charges for the basic tier, cable programming services, and equipment offered by cable systems subject to effective competition, with those charges made by systems not subject to effective competition.[181]

ii. Proposals

137. In order to comply with these requirements, we will need to collect certain cable system data. These data include rates charged for basic cable service, expanded basic service, and other cable programming; and fees for converter boxes, remote control units, program guides, installation and disconnection charges, and any other charges for equipment or service. Because we may wish to compare systems of similar sizes or other characteristics, we propose also to collect information on system size (measured by number of subscribers), system channel capacity, and possibly other characteristics such as percent of distribution plant above or below ground, length of distribution plant, and subscriber density per mile. We envision that the annual statistical report will consist of a compilation of the above data elements.

138. There are a number of possible ways to collect the specific data. Trade publications such as the *Cable Fact Book* collect much of the data we require, but such data are collected on a voluntary basis and are not always complete for each individual cable system. It appears to be necessary, therefore, to require cable operators to submit certain information directly to us on a regular basis. Such information obtained directly from cable operators would be reliable, complete and comparable. We request comment on the specific data to be collected. For example, should the data submitted be on a per system rather than a per franchise basis? Further, we note that the data we propose to collect for the annual report on rates may duplicate in part the data needed to carry out the ongoing rate regulation provisions of the Cable Act. These rate regulation responsibilities will likely require that we obtain rate and service data as described above. In addition, depending on the particular rate standard we ultimately adopt, we may also need data on various costs and other financial information. We tentatively conclude that we should combine all data requirements on a single form and request comment on that conclusion.

139. We realize that annual collection of data will be costly for both the industry and the Commission. One option for minimizing these costs would be to collect data from a sample of cable systems rather than from the industry as a whole. We propose to obtain information from a simple random sample of cable systems or, alternatively, from all the largest companies as well as from a sample of the smaller cable firms. The information would be reliable and comparable but not necessarily as complete as a survey of the entire industry. For example, since so few cable systems now face effective competition, a simple random sample of the industry may not yield reliable measures of rates for those systems. Hence, we might need to do a full survey of all systems facing effective competition. We seek comment on this issue. We also seek comment on how to identify systems subject to effective competition. Finally, commenters are invited to suggest other ways we may obtain the data needed to fulfill the annual reporting requirements specified in Section 623 (k).

i. Definitions

i. Statutory Requirements

140. The statute includes definitions of effective competition, cable programming service, and multichannel video programming distributor which we have already set forth.[182]

ii. Discussion

141. In order to implement the statutory definitions and rules to incorporate these terms, we propose to adopt the definitions without change. We solicit comment on this proposal. We additionally solicit comment on whether we should establish any additional definitions in our rules.

j. Effective Date

i. Statutory Requirements

142. The statute provides that the amendments to Section 623 establishing rate regulation of cable systems not subject to effective competition shall be effective 180 days from the date of enactment. The statute gives the Commission authority to prescribe regulations effective on the date of enactment. The statute expressly requires the Commission to establish regulations concerning rates for the basic service tier, rates for cable programming service, and prevention of evasions within 180 days of enactment.[183]

ii. Discussion

143. In order to assure that we meet the statutory deadline for implementing regulations, we propose to adopt implementing rules prior by April 3, 1993 and to make them effective as rapidly thereafter as is reasonably feasible. We seek comment on this proposal and on what if any interim requirements may be necessary as the rules come into force. We have tentatively concluded that, while our regulations must be in place 180 days from the date of enactment, the statute does not require that all implement-

[181] Communications Act, Section 623(k), 47 U.S.C. Section 543(k).

[182] *See* Communications Act §623(l)(1)-(2), 47 U.S.C. §543(l)(1)-(2).

[183] Communications Act, Sections 623(b)(2),(c)(1),(h); 47 U.S.C. Sections 543(b)(2), (c)(1), (h).

ing steps that cable systems must take to meet the obligations of the statute or our rules must be completed on that date.

D. Leased Commercial Access

1. Statutory Requirements

144. The 1984 Cable Act required cable operators Jto designate a percentage of their channel capacity for commercial use by unaffiliated persons, with the exact percentage varying depending on the system's total channel capacity.[184] The purpose of the leased access section of the 1984 Act was to assure diversity of information sources to the public in a manner "consistent with growth and development of cable systems."[185] Congress recognized that cable operators might not have the incentive to offer such diversity, if a particular programmer's offering represented a viewpoint conflicting with the operator's or competed with a program service the operator already provided.[186] At the same time, however, the terms of a leased access arrangement were not to adversely affect the operation, financial condition, or market development of the system.[187] It was the operator's editorial control, not his economic power, which was of concern to the Congress at this point in time. While the price, terms and conditions for leased access were subject to a standard of reasonableness, the operator's terms were presumed reasonable unless the unaffiliated programmer could make a clear and convincing demonstration that this was not the case.[188] Congress specifically contemplated permitting an operator to establish discriminatory rates, terms and conditions.[189] It also provided that any court reviewing a leased access dispute should not consider the price, terms or conditions establishedK-between an operator and affiliate for comparable service.[190]

145. As stated above, Section 612 of the Communications Act states that its purpose is to assure that the widest possible diversity of information sources is made available to the public from cable systems in a manner consistent with growth and development of cable systems. The amendments to Section 612 of the Communications Act contained in the Cable Act of 1992 add an additional purpose to the section: to promote competition in the delivery of diverse sources of video programming.[191] Other amendments to Section 612 grant the Commission authority: to determine the maximum allowable rates that a cable operator may establish for leased commercial access, including the rate charged for billing and collection services; to establish reasonable terms and conditions for commercial use of the system, including those to govern billing and collection; and to establish procedures for expedited resolution of disputes concerning rates or carriage.[192] The Commission is required within 180 days of enactment to adopt regulations exercising authority in these areas.

2. Discussion

a. Maximum Reasonable Rates

146. The language of Section 612, as amended by the Cable Act of 1992, that governs leased commercial access does not limit its application to only cable systems not subject to effective competition as the Act defines that term.[193] Accordingly, we tentatively conclude that our regulations governing the maximum reasonable rate for leased commercial access will apply to all cable systems. We also tentatively conclude that the Cable Act of 1992 does not necessarily require cable operators to provide billing and collection services. Rather, we believe that Congress intended only that we establish regulations governing the maximum rate for such services if an operator chooses to offer them. We also tentatively conclude that we should require that any charges for billing and collection services that axL cable operator may elect to provide be unbundled from other charges for leased commercial access. We solicit comment on these tentative conclusions.

147. We have initially identified three alternative standards for determining maximum reasonable rates for leased commercial access and for billing and collection services: reliance on benchmark rates based on costs of typical cable systems, reliance on the cost-of-service principles we have described previously at paras. _____, *supra*, and reliance on the marketplace where effective competition exists. A fourth possibility, not explored in detail herein but on which comments are solicited, would be for the Commission to establish a mechanism or formula under which subscriber rates for the basic service tier and/or cable programming services could be used to compute a rate for leased commercial access. We solicit comment on mechanisms for formulas that could be used for this purpose.[194]

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[184] Communications Act, 47 U.S.C. § 612 (b)(1), 47 U.S.C. § 532 (b)(1) (36-to-54 channel system to designate ten percent of channels not otherwise required for use by federal law or regulation; 55-to-100 channel system to designate 15 percent of channels not otherwise required for use by federal law or regulation; over-100 channel system to designate 15 percent of all channels).

[185] Communications Act, § 612 (a), 47 U.S.C. § 532 (a).

[186] House Committee on Energy and Commerce. H.R. Rep. No. 934, 98th Cong. 2nd Sess. 48 (1984) (1984 House Report).

[187] Communications Act, § 612 (c)(1), 47 U.S.C. § 532 (c)(1); 1984 House Report at 50.

[188] Communications Act, § 612 (f), 47 U.S.C. § 532 (f); 1984 House Report at 50-51.

[189] Congress stated that otherwise an operator might be forced to charge an average price lower than the fair market price for some services, but higher than the fair price for others. Congress stated that this might make it impossible for services offered by non-profit entities to obtain access. It noted that prices for premium services should probably be higher than for a news or public affairs service, and that both would be priced very differently from an educational or instructional service. 1984 House Report at 51.

[190] Communication Act, § 612 (d), 47 U.S.C. § 532 (d).

[191] Communications Act, Section 612(a), 47 U.S.C. Section 532(a).

[192] Communications Act, Section 612(c)(4)(A), 47 U.S.C. Section 532(c)(4)(A).

[193] In order to faciliate our review of issues concerning leased commercial access, we are directing commenters to address in a separate section of comments issues concerning leased commercial access.

[194] Comment is also requested on the manner and extent to which costs incurred in prohibiting or blocking indecent programming in accordance with the provisions of Section 10 of the Cable Act of 1992 should be factored into any of the above approaches.

Additionally, we seek comment on whether we should establish additional rate ceilings to govern rates for not-for-profit programmers.

148. *Benchmark Based on Typical System Costs.* Under this alternative, rates for leased commercial access would be governed by a benchmark based on costs incurred by a typical or ideal cable system for constructing and operating channel capacity. Such a benchmark would be particularly useful for cable systems whose rates for basic tier service and cable programming service were not subject to individual system cost-based regulation, possibly because they also met a benchmark. We solicit comment on the use of such a benchmark for regulating commercial access rates. We also seek comment on whether there are bases other than costs for setting a benchmark that we might use to establish maximum rates reasonable to both lessees and system operators.

149. *Cost-of-Service.* Under this alternative, the maximum reasonable rates for leased commercial access and for billing and collection services would be designed to recover the costs of providing those services. The advantage of this alternative is that it permits cable operators to recover costs of providing leased commercial access, but also promotes the statutory goal of assuring the widest possible diversity of information sources because rates would be based on costs. In addition, efficiencies that the cable operators can capture by virtue of their holding local franchises are Mpassed on to the programmers.

150. Under this alternative, we would require that the maximum reasonable rate would be based on all direct costs, an allocation of the joint and common costs of access and of providing other cable services, an allocation of general and administrative overheads, and a reasonable profit determined under cost-of-service regulatory principles that we have already discussed. Should we select the cost-of-service alternative, we solicit comment on whether we should require a fully distributed cost methodology to identify the joint and common costs to be recovered through rates for leased channel access or for billing and collection services.

151. The Cable Act of 1992 left unchanged the language of Section 623(c)(1) stating that the price, terms and conditions under which leased access occurs should be at least sufficient to assure that such use would not "adversely affect the operation, financial condition, or market development of the system." We ask for comment on whether a strictly cost-of-service method of setting maximum reasonable rates would be consistent with congressional concern that leased access not harm the financial condition of cable systems. We also seek comment on how demand for leased access should be factored into setting rates, particularly for less than full time use of the access channel, should we select a cost-of-service approach for determining the maximum reasonable rate for leased commercial access.

152. *Marketplace Rates.* Under this alternative, we would determine that where a competitive market exists for leased commercial access or for billing and collection services there would be no prescribed price or ratemaking methodology, *i.e.*, the cable operator would be able to charge the market price for leased commercial access and billing and collection services. The advantage of this approach is that it would eliminate the costs of regulation, while providing an expectation grounded in established economic theory that prices will remain reasonable and be driven to costs where competition exists.[195] We solicit comment on this approach generally and, in particular, on whether it is consistent with congressional intent and whether the Cable Act of 1992 authorizes us to rely on market forces to set such maximum rates. We also solicit comment on the extent to which a competitive market for leased commercial access currently exists. The Commission has already determined that a competitive market exists for billing and collection services justifying the detariffing of such services provided by$Ntelephone companies.[196] We solicit comment on whether the billing and collection services that were considered by the Commission in connection with telephone companies are the same as, or relevant to determining proper treatment of, the billing and collection services that cable systems might offer in connection with leased commercial access. We also ask whether the previous finding of the Commission concerning telephone companies' billing and collection services warrants adoption of a marketplace approach for determining the maximum reasonable rate for billing and collection services offered by cable operators.

153. *Special Rates for Not-for-Profit Programmers.* The legislative history of the Cable Communications Policy Act of 1984 indicates that Congress may have contemplated that cable operators be permitted to establish separate rate ceilings for different categories of programers taking commercial leased access.[197] We seek comment on whether the Cable Act of 1992 empowers us to set a lower maximum rate for leased commercial access for not-for-profit programmers, and ask whether this could help assure the diversity of programming sources on cable systems sought by the drafters of Section 612. We ask to what extent we can permit costs of providing leased commercial access to not-for-profit programmers to be recovered from other leased access customers or from cable subscribers on all tiers generally. We also solicit comment on the impact on operators and subscribers of requiring that leased access be provided at special rates to such programmers. We solicit comment generally on the need for special rates for not-for-profit programmers.[198]

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[195] Stigler, The Theory of Price, 4th ed. at 178-192 (1987).

[196] Detariffing of Billing and Collection Services, CC Docket No. 85-88, Report and Order, 102 FCC 2d 1150 (1986), *recon. denied* 1 FCC Rcd 445 (1986).

[197] "...[N]othing in these provisions is intended to impose on a cable operator the requirement that he make available on a non-discriminatory basis, channel capacity set aside for commercial use by unaffiliated persons. [N]on-discriminatory access requirements could well undermine diversity goals ... [B]y establishing one rate for all leased access users, a price might be set which would render it impossible for certain classes of cable services, such as those offered by not-for-profit entities, to have any reasonable access to a cable system. ... A premium movie service will obviously warrant a very different and, in all probability, a higher price than a news or public affairs service, and both of these would pose a different pricing situation from an educational or instructional services." Report on HR 4103, Report 98-934 at p. 51.

[198] Should we establish special provisions for not-for-profit programmers, we propose to make these provisions applicable to

154. In addition to the above proposals, we solicit comment on whether we need to take any measures to assure that our regulations governing maximum resale rates for leased commercial access are fulfilling the statutory objectives of Section 612. We solicit comment on relying on the complaint process to monitor the effectiveness of our regulations. Alternatively, or in addition to the complaint process, we could establish a reporting requirement that will enable us to track the use of leased commercial access and rates charged for that use. Specifically, we could require cable operators to provide on an annual basis the following information: set-aside capacity required, percentage of set aside capacity used, percentage of set-aside capacity used by not-for-profit programmers, and prices charged for leased access. We solicit comment on this alternative, and, should we adopt it, ask whether we should exempt small systems from compliance with some or all of these reporting requirements.

b. Reasonable Terms and Conditions of Use

i. Statutory Requirements

155. Section 612 (c)(4)(A)(ii) requires the Commission to "establish reasonable terms and conditions"[199] for commercial use of leased access cable channels.[200]

ii. Discussion

156. In enacting Section 612 (c)(4)(A)(ii) in 1992, Congress apparently was particularly concerned that leased access programmers be offered a "genuine outlet" for their product.[201] Thus, we seek comment on whether we need to address in our rules tier location, channel position, and time scheduling for leased access use. Such regulation might bring more uniformity to the terms and conditions governing leased access use. It also could increase certainty in the leased access market and thus, increase usage of leased access channels, consistent with Congressional intent.[202] We seek comment on this alternative and on what factors we should take into account if we adopted it, *e.g.*, channel capacity of the Psystem, number of channels required to be designated for leased access use, or nature of the leased access material. We also seek comment on how such an alternative could be fashioned so that it intruded minimally upon programming decisions negotiated by private parties and on the discretion of the cable operator with respect to channel positioning and configuration of its system. Balancing Congress' concern that leased access channels provide a genuine outlet for programmers with the fact that the Cable Act of 1992 leaves intact the general prohibition on the cable operator's exercising editorial control over leased access, we seek comment on what the appropriate scope of the operator's discretion regarding tiering and channel location for leased access should be.[203]

157. We tentatively conclude that we should establish guidelines for technical standards and conditions for leased access. We propose to require that operators apply the same technical standards they apply to programs to be carried on public, educational, and governmental access channels to leased access programs. Thus, an operator could not reject for technical reasons a program for leased access airing if it would not reject the program for the same reasons for airing on public, educational or governmental access channels. We seek comment on this proposal. We also seek comment on what, if any, technical and production facilities the cable operator should be expected to offer leased access users. For example, should the operator be required to provide only minimal technical support, *e.g.*, the playing of a tape, or should more advanced equipment and support be made available? Presumably the leased access programmer would be required to pay for the technical support it used. Would we base the necessary level of technical support on the size of the cable system, the capabilities of the programmer, or both? Should a satellite programmer desire leased access, would an operator be required to provide satellite receive facilities?

158. If a programmer receives access to a commercial leased channel without prepayment in full for such access, we ask when the operator should be able to require posting of a bond or deposit. We also seek comment on the impact of any bond or deposit requirement on programmers' ability to secure access to leased channels.

159. While the Communications Act does not give cable operators editorial control over leased access programming,[204] the Cable Act does permit operators to prohibit or to channel indecent material on leased access channels.[205] We are presently considering how to implement these provisions of the Act.[206] Thus, we propose generally to prohibit a cable operator from setting terms or conditions for leased access use based on content, with the exception that an operator "may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person."[207] We also propose to except from this prohibition on influencing content those terms and conditions relating to indecent material that would be consistent with the Cable Act and the implementing regulations we ultimately adopt. We seek comment on this approach.

160. Existing Section 612 (c)(1) provides that an operator shall establish prices, terms and conditions for leased access to an unaffiliated user at least sufficient to ensure that such use "not adversely affect the operation, financial condition,

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entities that are tax exempt because of their not-for-profit status as defined by the Internal Revenue Service. §501(c)(3). We solicit comments on this proposal.

[199] Communications Act, §612(c)(4)(A)(ii), 47 U.S.C. §532(c)(4)(A)(ii).

[200] See *supra* paras. 146-54 addressing terms and conditions for billing and collection.

[201] Senate Report at 79.

[202] Senate Report at 31-32.

[203] Under § 10 of the Act, a cable operator is not precluded from exercising editorial control over indecent speech. Communications Act, § 612 (c)(2), 47 U.S.C. § 532 (c)(2).

[204] Communications Act, § 612 (c)(2), 47 U.S.C. § 532 (c)(2).

[205] Communications Act, § 612 (h), (j), 47 U.S.C. § 532 (h),(j).

[206] *See Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, Indecent Programming and Other Types of Materials on Cable Access Channels*, Notice of Proposed Rulemaking, MM Docket No. 92-258, FCC 92-498 (released Nov.10, 1992).

[207] Communications Act, § 612 (c)(3), 47 U.S.C. § 532 (c)(3).

or market development of the cable system."[208] We seek comment on how to ensure that regulations we establish for leased access terms and conditions are consistent with this provision and do not undermine the financial condition of the cable system, while at the same time harmonizing with the statutory provisions governing the maximum rate for leased access. The legislative history of the 1984 Act indicates that Congress contemplated different treatment of leased access providers, who by definition are unaffiliated with the operator,[209] and of affiliated entities who may also lease a channel or have an equivalentpRarrangement.[210] It is unclear whether in passing the 1992 Cable Act, and requiring us to establish reasonable terms and conditions for leased access use, Congress intended to reinforce or reduce such differentiation. We thus seek comment on whether we have the authority to and, if so, whether we should require operators to apply the same terms and conditions to the leasing of channel capacity by both affiliated and nonaffiliated users. If so, would this requirement extend to services such as billing and collection? We also seek comment on how our regulations might permit the beneficial discrimination which Congress considered might be necessary to establish terms and conditions that might be needed, for example, by non-profit program suppliers.[211]

161. We also seek comment on whether there is any need to reconcile the amendments made by the Cable Act of 1992 with the existing statute and its underlying objective of promoting diversity. For example, one may speculate that if rates for leased access are low enough, unaffiliated programmers may seek to move their program offerings from other channels to those set aside for leased access, thereby diminishing the number of channels available for leased access without adding to the diversity of programming offered on the system. We seek comment on the probability of such migration occurring, the likely impact of such actions, and whether there is any need to take regulatory action at this time to prevent it.

c. Procedures for Expedited Resolution of Disputes

i. Statutory Requirements

162. The Cable Act requires that we establish procedures "for the expedited resolution of disputes concerning rates or carriage" of leased access.[212]

ii. Discussion

163. The legislative history of Section 612(c)(4)(A) indicates that Congress believed that existing provisions of the Cable Act of 1984 entitling aggrieved leased access users to bring action in federal district court or to file complaints at the Commission were too cumbersome. Congress believed these provisions, together with the imposition of a high burden of proof on access users, may have led to limited demand for leased access.[213]

164. One means of fulfilling Congressional intent to increase use of leased access channels would be to streamline this Commission's dispute resolution procedures for aggrieved leased access users. Thus, we propose to permit an aggrieved access user to file a petition for relief alleging that an operator's rates or terms and conditions for use of leased access capacity violate our rules. The petition could consist of a short and plain statement of the facts constituting the violation and the specific rule or regulation allegedly violated. We would require service of the petition on the cable operator. The cable operator would have a relatively brief period, *e.g.*, 10 or 15 days, in which to respond.

165. If, at that point, the Commission determines that a *prima facie* case of violation of our rules pursuant to Section 612(c) has been made, the burden of production would then shift to the operator to disprove the allegations. At this stage, we might also issue an order requesting further information from the operator, under procedures analogous to those established for complaints of unreasonable rates.[214] We seek comment on this approach. We also ask whether it would be consistent with Section 612(h) of the Communications Act, which creates a presumption that, the prices, terms and conditions for use of channel capacity designated pursuant to subsection (b) [of Section 612] are reasonable and in good faith unless shown by clear and convincing evidence to the contrary.[215]

166. We propose that if a petitioner has made out a *prima facie* case of a violation of our rules promulgated pursuant to Section 612(c), this case would be sufficient to rebut the presumption that the prices, terms and conditions for leased access are reasonable. If such allegations are proven, they would constitute clear and convincing evidence of unreasonable practices or rates and meet the burden of proof imposed under the Act. We seek comment on this "Tapproach. We also seek comment on alternative approaches to reconciling the provisions of the 1984 Act, which presume that the operator's good faith prices, terms and conditions are reasonable, with the provisions of the 1992 Act, which require us to establish reasonable terms and conditions and to determine maximum reasonable rates for leased access.

167. As a matter of general policy, we also believe that parties should bring complaints to the Commission's attention in a timely manner. This policy will help to guard against determinations based on a stale record, as well as forestall development of any patterns of abuse.[216] We also propose to give oral rulings in those situations in which time is of the essence, to be followed by a written formal ruling. We seek comment on what types of cases might be appropriate for such emergency treatment. We tentatively find that rate disputes, which are generally complex in nature, should not be the subject of emergency action at

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[208] Communications Act, § 612 (c)(1), 47 U.S.C. § 532 (c)(1).

[209] Communications Act, § 612 (b)(1), 47 U.S.C. § 532 (b)(1) (a cable operator shall designate channel capacity for commercial use by persons "unaffiliated" with the operator).

[210] 1984 House Report at 53. *See also* Communications Act, § 612 (d), 47 U.S.C. 532 (d).

[211] *See supra* para. 153.

[212] Communications Act, §612(c)(4)(A)(iii), 47 U.S.C. § 532(c)(4)(A)(iii).

[213] House Report at 39-40.

[214] *See generally* paras. 97-110 *supra*.

[215] Communications Act, § 612(f), 47 U.S.C. § 532(f).

[216] Furthermore, the Communications Act also provides for time limitations on the assessment of forfeitures. *See, e.g.*, Communications Act, § 503(b)(6)(B), 47 U.S.C. § 503(b)(6)(B).

the Commission. Moreover, we believe that it would be possible in such cases to devise procedures that will enable a user to have access before a Commission decision is made. We propose to require that the user provide some form of security, *e.g.*, establish an escrow account, while the rate dispute is being determined, and seek comment on the fairness of this procedure to all parties involved.

168. We seek comment on the use of Alternative Dispute Resolution ("ADR") for leased access petitions filed at the Commission. The legislative history, as indicated above, reflects concern that "cumbersome" administrative procedures may have limited usefulness for leased access.[217] In light of this history, when the circumstances of a given case are fairly straightforward, we tentatively conclude that ADR may be the most appropriate means of resolving conflicts by providing both expedition and cost-effectiveness.[218] We also assume that it could be made available to parties in the franchise area in which they are located, adding the benefit of geographic convenience in such cases. The election of mediation by the parties would be purely voluntary, under the Administrative Dispute Resolution Act, 5 U.S.C. §582(c)(1990).

169. We seek comment on this approach, and on whether we should encourage its use. We also seek comment on whether parties should be permitted to elect ADR at the outset of a dispute or whether election should take place only at the time we rule that a *prima facie* case has been established. We also seek suggestions on what types of disputes would be most suitable for ADR. Specifically, we seek comment on whether conflicts concerning rates, credit terms, technical quality, or other terms or conditions would reasonably lend themselves to resolution by mediation, or whether certain categories of disputes would be better resolved by other means.

170. We also seek comment on whether and how we might enlist the assistance of local franchising authorities in resolving leased access disputes. Disputes concerning leased access may be so time sensitive that they would be better handled by local decision makers. We thus ask whether parties should be permitted to seek resolution of leased access disputes by franchising authorities. We seek comment on whether this option should be voluntary, or possibly be required as a prerequisite to review by this Commission. On the latter point, we seek comment on whether such a requirement would be consistent with the language and intent of the Cable Act. Finally, we seek comment on what types of leased access disputes may be suitable for franchising authority resolution.

d. Leased Access for Minority and Educational Programmers

i. Statutory Requirements

171. The Cable Act permits a cable operator to place programming from a qualified minority or educational programming source on up to 33 percent of the cable system's designated leased access channels. Programming already carried by a cable system as of July 1, 1990 does not qualify as minority or educational programming for purposes of this section.[219] The Act defines a qualified minority programming source as one that devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned, as the term minority is defined in Section 309(i)(3)(C)(ii) of the Communications Act. The Act defines a qualified educational programming source as one that devotes substantially all of its programming to%Veducational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, and the arts and has a documented annual expenditure on programming exceeding $15 million.[220]

ii. Discussion

172. We propose to adopt this subsection as part of our rules. The Cable Act defines "minority" with reference to Section 309(i)(3)(C)(ii) of the Communications Act, which identifies Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders as minority groups. We thus tentatively find that, for purposes of the minority programming provision, programming that covers "minority viewpoints" or is "directed at members of minority groups" would have to cover the viewpoints of or be targeted to members of the above-listed groups. We seek comment on this proposal and tentative conclusion. We also propose to reflect the statutory definition of educational programming source described above in our rules. We seek comment on this proposal.

173. The Act qualifies minority and educational programming sources for leased access under this section if they devote "substantially all" of their programming to the coverage of minority viewpoints or to educational or instructional programming.[221] We seek comment on the amount or proportion of programming necessary to fulfill this requirement.

C. Subscriber Bill Itemization

1. Statutory Requirements

174. Section 622(c) of the Communications Act, as amended by the Cable Act, permits a cable operator to itemize, on separate lines on each regular subscriber bill, (1) the amount of that bill attributable to the franchise fee, together with the identity of the franchising authority to which the fee is paid, (2) the amount attributable to the support or use of public, educational, or governmental channels which is required under a franchise agreement, and (3) the amount of the total bill attributable to any other governmental assessments on transactions between the operator and the subscriber.[222]

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[217] House Report, *supra*, at 40. *See also* Senate Report at 31.
[218] *See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, 6 FCC Rcd 5669, 5670 (1991).
[219] Communications Act, § 612(i), 47 U.S.C. § 532(i).
[220] Communications Act, § 623(i)(3), 47 U.S.C. § 532(i)(3).
[221] Communications Act, § 612(i)(2), § 612(i)(3); 47 U.S.C. § 532(i)(2), 47 U.S.C. § 532(i)(3).
[222] Communications Act, § 622(c), 47 U.S.C. § 542(c).

2. Discussion

175. The Conference Report states that an amendment was made to the legislation to clarify that itemization must be done in a manner consistent with our regulations implementing Section 623.[223] The House Report indicates that only direct and verifiable costs within the above-listed categories may be so itemized.[224] Section 623 provides that rules governing basic service rates shall take into account "the reasonably and properly allocable portion" of amounts assessed as franchise fees, taxes, or governmental charges assessed on operator/subscriber transactions, and any amount required to satisfy franchise requirements to support public, educational, or governmental channels, or the use of such channels under a franchise.[225] We seek comment on the possible differences and the interrelationships between Section 622(c) and Section 623. The House Report also indicates that Congress explicitly intended that such costs be itemized as part of the total bill, but not separately billed.[226] We propose to reflect this Congressional intent in our rules incorporating Section 622(c). We seek comment on this proposal, and on any other regulations that may be necessary to adequately implement this provision.

III. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

176. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

177. *Reason for action.* The Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe rules and regulations for determining reasonable rates for basic tier cable service, including rates for equipment and installation, and procedures for implementation and enforcement of those rules. The Cable Act of 1992 also requires the Commission to establish criteria for identifying unreasonable rates for cable programming services, and procedures for resolving complaints regarding cable programing services. In addition, the statute requires the Commission to establish rules for determining the reasonable terms and conditions and maximum reasonable rates for leased commercial assess, including billing and collection.

178. *Objectives.* To propose rules to implement Sections 3 and 14 and those portions of Section 9 pertaining to rate regulation, of the Cable Television Consumer Protection and Competition Act of 1992. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize the regulatory burden on affected parties.

179. *Legal basis.* Action as proposed for this rulemaking is contained in Sections 4(i), 4(j), 303(r), 612(c), 622(c) and 623 of the Communications Act of 1934, as amended.

180. *Description, potential impact and number of small entities affected.* Until we receive more data, we are unable to estimate the number of small cable systems that would be affected by any of the proposals discussed in the Notice of Proposed Rulemaking. We have, however, attempted to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by Section 3(i) of the Cable Act of 1992.

181. Reporting, record keeping and other compliance requirements. The proposals under consideration in this Notice of Proposed Rulemaking include the possibility of new reporting and record keeping requirements for cable systems.

182. Federal rules which overlap, duplicate or conflict with this rule. None.

183. Any significant alternatives minimizing impact on'Ysmall entities and consistent with stated objectives. Wherever possible, the Notice proposes general rules, or alternative rules for small systems, to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by Section 3(i) of the Cable Act of 1992.

IV. PAPERWORK REDUCTION ACT

184. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

V. PROCEDURAL PROVISIONS

185. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft Order proposing a substantive disposition of the proceeding is placed on the Commission's Open Meeting Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and oral arguments) between a person outside this Commission and a Commissioner or a member of this Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on this

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223 Conference Report at 84.

224 House Report at 86.

225 Communications Act, § 623 (b)(2)(C)(v), (vi), 47 U.S.C. § 543 (v), (vi). Section 623 (b)(2)(C)(v) also requires that our rules take into account assessments of "general applicability" imposed on cable operators or subscribers. We do not interpret Section 622(c) as applying to such generally applicable assessments and seek comment on this view.

226 House Report at 86.

Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation. On the day of the oral presentation, that written summary must be served on this Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules. 47 C.F.R. § 1.1231.

186. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before January 27, 1993 and reply comments on or before February 11, 1993. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information on this proceeding contact Patrick Donovan at (202) 632-1295, Regina Harrison at (202) 632-7792, Jay Atkinson at (202) 634-1861, Hugh Boyle at (202 634-1861, Alan Aronowitz at (202) 632-7792, or Nancy Boocker at (202) 632-6917.

VI. ORDERING CLAUSES

187. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i), 4(j), 303(r), 612(c), 622(c) and 623 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 303(r), 532(c), 542(c), 543, NOTICE IS HEREBY GIVEN of adoption of proposed regulatory changes and amendments to the Commission's rules and regulations in accordance with the proposals, discussions, and statements of issues in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statements of issues.

188. IT IS FURTHER ORDERED, that a rulemaking proceeding IS INSTITUTED to implement Sections 623, 612, and 622(c) of the Communications Act of 1934, as amended by the the Cable Television Consumer Protection and Competition Act of 1992.

189. IT IS FURTHER ORDERED, that commenters SHALL ADDRESS in a separate section of their comments issues concerning leased commercial access raised in paragraphs 144-73, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Appendix A

Proposed Cost Accounting Requirements

Part 76 of the Commission's rules is amended to add a new

Subpart L -- Accounting and Cost Allocation Requirements to read as follows:

Subpart L -- Accounting and Cost Allocation Requirements

76.701 General Accounting Requirement

For the purpose of making cost determinations required by the Commission, cable operators shall maintain their accounts in accordance with generally accepted accounting principles except as otherwise directed by the Commission. For purposes of this section, cable service includes all programming services offered to subscribers and leased commercial access.

Each cable operator shall maintain accounts in a manner that will enable it to identify on a system basis and to apply assignment and allocation procedures where specified by the Commission, to the following categories of expenses and revenues:

Expenses:

Operating Expenses:
- Technical (operation and maintenance of cable system)
- Programming
- Marketing
- General & Administrative

Depreciation on Fixed Assets

Amortization on Intangibles including Goodwill

Interest on Debt:
- Debt associated with allowable ratebase as defined in §76.702.
- Other Debt

Income Taxes

Revenues:

Subscription Fees:
- Basic Tier
- Other Tiers

Advertising

Equipment:
- Installation
- Maintenance and Repair
- Sale
- Lease

Pay-per-view

Leased Access:
- Access
- Billing and Collection Service

Other

76.702 Cost Categories

Costs recoverable for cable services regulated by this Commission shall include operating expenses, and depreciation, amortization, return and taxes on the allowable ratebase. The allowable ratebase shall include, except as limited by the Commission, the average annual investment in the following categories:

Net Working Capital (Current Assets - Current Liabilities)

Fixed Assets (Net of Accumulated Depreciation):

Land and Buildings

Headend

Trunk and Distribution System

Program Origination Equipment

Construction Work in Progress

Other Fixed Assets

Other Assets excluding Goodwill (Net of Accumulated Amortization)

Goodwill (Net of Accumulated Amortization)

76.703 Joint and Common Costs

Allowable costs as specified in §76.702 which cannot be directly assigned to cable services (all tier services, leased access, and pay channels), to installation, maintenance, and repair of customer equipment, or to other services, shall be described as joint or common costs. Cable operators shall be capable of determining on a system level the joint and common costs for providing cable services. System level joint and common costs shall include corporate level overheads allocated proportionately to the system on the basis of the number of subscribers served by the system over the total number of subscribers served by the corporation.1111

Joint and common costs shall be allocated among service categories (*e.g.*, cable services, equipment installation services) as follows:

(a) Wherever possible, joint and common costs are to be allocated to service categories based on direct analysis of the origin of the costs themselves.

(b) When direct analysis is not possible, joint and common costs shall be allocated to service categories based on an indirect, cost-causative linkage to other costs directly assigned or allocated to the service category.

(c) When neither direct nor indirect measures of cost allocation can be found, the joint and common costs shall be allocated to each service category based on the ratio of all costs directly assigned and attributed to a service category over total costs directly assignable and attributable.

76.704 Per Channel Costs

Cable systems shall determine per channel costs on a system basis. Per channel cost determinations for a system shall employ the following general methodology for tier-services and leased access capacity:

(a) The per-channel cost for any particular channel shall include the direct assignment of any costs associated with the programming of such channel.

(b) Where a per-channel cost determination is required for a leased access service channel, a portion of the joint and common costs of providing cable service as determined under Section 76.703 shall be included. The amount of joint and common costs allocated to a leased access channel shall be the total amount of joint and common costs of providing cable service divided by the total number of usable activated channels over which cable service including leased commercial access is being provided on the system.

(c) The joint and common costs included in the cable services category shall be allocated to tier-services on the basis of the ratio of the number of tier-services channels used to the total number of usable activated channels over which service is being provided in the system. This amount shall then be allocated to each tier-service channel on the basis of the proportion of the direct expenses assigned to each channel over the total expenses directly assigned to tier-services channels.

76.705 Tier Services Costs

Cable systems shall determine the total costs for each service tier by assigning to each tier the total of any non-programming and programming costs directly assignable to the tier, and the joint and common costs and return element allocated to each channel in the tier, less that portion of advertising revenues on the channels in the tier determined by the Commission.

76.706 Leased Access Services Costs

The cost of lease access service shall be based on the per channel costs for leased access service plus any direct costs associated with the lease access activity.

76.707 Equipment Services Costs

(a) The cost of installation, lease, maintenance and repair of customer equipment shall include all direct material and labor costs associated with those activities, plus any joint and common costs assignable to the activity as determined by the methodology specified in §76.703.

APPENDIX B

Cost-of Service Standards

1. Cost-of-service regulation requires the regulatory authority to make determinations relating to four major cost components: rate base, the cost of capital, depreciation, and operating expenses. Cost-of-service regulation also generally requires rules governing the design of rates once deter-

minations have been made concerning the four major cost components. In order to permit adoption of standards for cost-of-service showings for cable operators seeking to justify rates above a benchmark, we solicit comment on the what requirements we should adopt in each of these areas and on the particular issues raised below.

2. *Rate Base.* Rate base determines the investment upon which a company is allowed to base depreciation and to earn a return. The costs the regulated company may include in the rate base have traditionally been determined by applying the used and useful standard to the original construction cost of the assets dedicated to service.[227] Under full rate of return regulation, cost allowances or disallowances can be made, for example, for cash working capital, excess spare capacity, plant under construction, and plant held for future use. We seek comment on whether we should apply the used and useful standard to govern what cable operators may include in the rate base for cable service.

3. Goodwill is the accounting term for the premium paid over original cost to acquire an existing system including the franchise and the existing plant and equipment. The direct benefit of the premium is to the operator selling the system, not the cable customer, since it contributes nothing to the plant supporting service to customers. Indirectly, customers may benefit from the sale if the purchaser is able to realize operating efficiencies unobtainable by the seller. In competitive markets, premiums over original cost are presumably rooted in potential operating efficiencies. In non-competitive markets, however, premiums may, at least in part, be predicated on the expectation that customers have no alternative to paying a rate for service that includes a monopoly rent component.

4. The Cable Act of 1992 found that cable operators face no effective competition in most markets, and that cable service customers have experienced rapidly increasing rates since deregulation. It is possible therefore that at least in some cases purchase premiums for cable franchises reflect some expectation of monopoly profits. We seek comment on the extent to which goodwill represents the capitalization of operating efficiencies that could not have been realized by the original cable system operator and, therefore, should be included in the rate base, and on how this element of goodwill can be quantified. To the extent goodwill does not represent such a capitalization of operating efficiencies, we ask whether we should limit a cable system's ability to recover goodwill from its subscribers by excluding some or all of it from rate base. We seek comment on the impact of this determination on the cable industry, investors, and subscribers.

5. We also seek comment on how customer equipment should be treated in terms of a cable system's rate base. Should it be treated as a current expense and excluded from the rate base or should it be included and permitted to earn revenue over time? Should it be treated differently depending on the extent to which the cost is recovered when the equipment is placed in use or the installation complete? It would be unrealistic and unfair to burden early subscribers with peak investment made for anticipated future increases in subscribership. One way to avoid this outcome would be to exclude part of first building investment from the rate base by including in that base only a portion of this investment, for example, twice the subscriber penetration percentage, during an introductory period of the shorter of 5 years or until 50% penetration is achieved, and capitalizing the identifiable interest expense associated with excluded plant. A somewhat more favorable treatment for cable operators would be to allow all investment in rate base, but, during an introductory period, reduce the revenue requirement by capitalizing the interest expense on the complement of investment times twice the penetration percentage. Investments in periodic rebuilds to add channel capacity would be excluded from rate base as plant held for future use until the channels are in service. Comment is sought on ways fair to both subscribers and operators of reducing the burden on ratepayers of cyclical investment. Comment is also sought on the impact of such changes on cable systems.

6. We also seek comment on whether a cable system's rate base should exclude customer equipment and be reduced by investment associated with customer equipment installation and maintenance. Customer equipment includes converter boxes, remote control units and any other equipment furnished to the customer subscribing to the basic tier or programming services. For purposes of ratemaking, the Cable Act of 1992 separates the installation and leasing of customer equipment from the provision of basic tier services.[228] The Commission has relied on time reporting and other allocation methods to apportion maintenance costs between the regulated and non-regulated functions of common carriers. Comment is sought on how to apportion joint and common costs of providing basic tier service and equipment between these two functions. What methods or rules do operators use today to identify the share of such costs associated with the provision of basic tier service?

7. *Cost-of-Capital.* Generally the largest single expense after depreciation for a capital intensive industry is the cost of borrowing capital. Under applicable standards governing cost-of-service regulation, rates for a public utility must be set to permit it to earn a return on its capital investment that is sufficient to assure confidence in the capital soundness of the utility, to maintain its credit, and to attract capital.[229] This is usually referred to as the capital attraction standard. In order to assure that this standard is met, it is necessary for the regulatory authority to determine the cost of capital for the regulated enterprise. This is usually

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[227] This Commission has applied the used and useful standard to communications common carriers under rate of return regulation. *See, American Telephone and Telegraph Company,* 9 FCC 2d 30 (interim Decision), *aff'd on recon.* 9 FCC 2d 960 (Docket 16258) (1967); *American Telephone and Telegraph Co.,* 64 FCC 2d 1 (Docket 19129 Phase II Decision) (1977), *recon. in part,* 67 FCC 2d 1429 (Docket 19129 Reconsideration Order) (1978). For the concept of basing utility rates on used and useful assets, *see, Munn v. Illinois,* 94 US 113, 134 (1877); *Stone v. Farmer's Loan and Trust Co.,* 116 US 307 (1886); *Reagan v. Farmer's Loan and Trust Co.,* 154 US 362 (1894). For valuation of used and useful assets at net investment in plant and property, *see, Los Angeles Gas and Electric Co. v Railroad Commission of California,* 289 US 287 (1933); *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission,* 262 US 276 (1923); *Minnesota Rate Cases (Simpson v. Shepard),* 230 US 352 (1913); *San Diego Land and Town Co. v. National City,* 174 US 739 (1899).

[228] See discussion in paras. 62-71, *supra,* concerning ratemaking for customer equipment and installation.

[229] *See e.g.,* Bluefield Water Works Improvement Co. v. PSC, 262 U.S. 679 (1923), FPC v. Hope Natural Gas, 320 U.S. 591 (1944).

done on an industry-wide basis. Thus, it may be necessary to establish a cost of capital for cable companies seeking to make a cost-of-service showing.

8. The capital structure and debt and equity costs of many cable companies are different than that of mature public utility companies. Much of the debt and equity invested in the cable industry is not publicly held and poses evaluation and confidentiality problems. Of the few cable companies with widely traded public stock, several have in the recent past posted large losses in equity value and appear to be trading on the expectation that the long-term growth rate in earnings will be extremely high.[230]

9. The cost of capital for companies facing effective competition is predicated on the expectation that it is difficult to exceed the competitive return. The return stock holders expect and debt holders demand thus primarily reflects investor perception of the financial and business risk of the individual company. The Cable Act of 1992 reflects the view that many cable markets are not competitive and that the resulting industry market power has been used its market power to raise rates above competitive levels.[231]

10. The cost of capital for cable companies may be substantially influenced by investor hopes for profits in excess of what competition would allow and fears of government intervention to reduce those profits. We ask whether expectations of future government regulation could cause the observed cost of capital for cable companies to be far higher than would be necessary to induce investors to supply capital for providing cable service under a cost-of-service regulatory regime. We ask whether it is correct that providing basic tier cable service and cable programming services is no more risky than, for example, what the Standard & Poors 400 industrial companies do.

11. In the *1990 LEC Represcription Order* [232] this Commission used the S&P 400 companies to establish equity market benchmarks in setting a cost of equity for interstate access service. We found that there was no convincing evidence that the riskiness of regulated monopoly telephone operations exceeds the riskiness of non-regulated firms subject to full competition. We concluded that the cost of equity for interstate access should be well below the median for the S&P 400.[233] We seek comment on how a fair cost of capital for cable services should compare to the average cost of capital for the companies in the S&P 400. We seek comment on whether the prescribed cost of capital for the cable dindustry should be higher, lower or the same as that allowed other regulated industries. We seek comment generally on if and how we should determine the cost-of-capital of cable companies.

13. *Depreciation.* Depreciation affects revenue requirements in two ways. Depreciation expense, calculated as the depreciation rate times gross plant, spreads the recovery of the capital invested in plant over its useful life. Accumulated depreciation reserve is the sum of returned capital and is subtracted from gross plant to calculate the rate base to which the prescribed rate of return is applied. Traditionally this Commission has reviewed the depreciation rates and practices of the companies it regulates. Allowable depreciation expense has been defined using straight line depreciation over the expected service life of plant investment. We seek comment on the expected service life of cable plant and current industry depreciation practices, and the methods the industry now uses to determine annual depreciation expense, *e.g.*, straight line vintage life group or straight line equal life group.

14. The use of an original cost rate base requires a determination of the depreciation reserve. The book reserves of cable companies were not accumulated on the basis of prescribed depreciation rates. Comment is sought on the impact of using existing book reserves and prescribing depreciation expense on the basis of expected remaining service life.

15. To the extent that we deferred recovery of capital costs of certain facilities during some introductory period to avoid ratepayer burden, we would propose also to defer recovery of the associated depreciation expense. One way to accomplish this is to allocate depreciation on the units of production method. Each year's depreciation expense would be related to its fraction of the total paying subscriber years of service expected over the life of the investment.

16. We solicit comment on requiring that goodwill, to the extent that it is allowed in the rate base, be amortized over the remaining life of the associated franchise or, alternatively, over 40 years the generally accepted practice under GAAP. We ask whether this would be appropriate for the cable industry. We also seek comment on whether the amortization of goodwill not in rate base should be an allowable expense and what is the appropriate amortization period.

17. *Operating Expense.* Operating expenses include plant specific costs (*e.g.*, maintenance), plant non-specific costs (*e.g.*, power, engineering and testing), customer'eoperations (*e.g.*, marketing, billing and collection), and corporate operations (*e.g.*, planning, accounting, finance, and legal). Operating costs would also include the costs of obtaining and transmitting programming. For a cable operator serving a single franchise and having no other operations, we seek a simple method of identifying the operating expenses that should be recoverable from cable services. We note that the Cable Act of 1992 appears to require that the investment, expenses, and revenue associated with the installation, maintenance, and leasing of customer equipment used to receive the basic tier be segregated for determining the costs recoverable from equipment charges. For multi-franchise operators, allowable costs may be directly attributable to a particular service within a franchise area or apportioned on the basis of relative number of subscribers or households passed, relative plant investment, or actual use factors (*e.g.*, maintenance trips.) We seek comment on whether cable systems' property records are sufficiently detailed to support apportionment based on plant investment and what actual use factors are widely available.

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[230] *See* Institutional Brokers Estimate System (IBES), Monthly Summary Data Book (July 18, 1991), Lynch, Jones, and Ryan, 345 Hudson Street, New York, N.Y. 10014

[231] Cable Act of 1992, § 2 (a) (1)-(5).

[232] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, *Order*, 5 FCC Rcd 7507 (1990) (*1990 LEC Represcription Order*) , *recon. denied*, 6 FCC Rcd 7193 (1991), *petitions for review docketed sub nom.*, Illinois Bell Telephone Co., *et al.* v. FCC, No. 91-1020 (D.C. Cir. filed January 11, 1991).

[233] *1990 LEC Represcription Order* 5 FCC Rcd at 7528.

18. *Design of Rates.* The revenue requirement consists of operating expenses, depreciation expense, franchise fees and related costs, taxes and return on rate base. The link between the revenue requirements and rates is the apportionment of cost recovery among services and ultimately subscribers. We solicit comment on two alternative methods of identifying the portion of the revenue requirement recoverable in basic service rates. We could calculate the basic tier costs as direct channel costs, less direct channel revenues, plus an allocation of other costs based on relative number of channels in use. This would represent the maximum cost recoverable in rates for that tier under the Cable Act of 1992. If that cost were divided by the projected number of subscribers, the entire cost would be recovered from the rates for the basic tier. Alternatively, the costs of the basic tier could be calculated as direct channel costs, minus advertising revenues, plus an allocation of other costs based on relative direct channel costs. If the costs for programming on basic tier channels were lower than for other tiers, this method would allocate fewer costs to the basic tier than the per-channel method. It would also be consistent with this Commission's Part 64 rules, which require that joint and common costs not directly assignable, or attributable using a cost-causative linkage to a directly assignable cost, be allocated based on a general allocator computed using the ratio of all expenses directly assigned or attributed.[234] We#f seek comment on the proportion of costs directly assignable, on relative direct channel costs, and on whether a direct cost plus general allocator formula would produce a fair and reasonable rate for the basic tier.

19. We seek comment on these two alternatives for design of rates for the basic service tier. Other allocation methods may also be consistent with our rules. We note that, for example, the methods we have proposed may be combined. Joint and common costs could be allocated on relative number of channels between pay, leased access, and all other. Within the all other category, joint and common costs could be allocated on relative direct channel costs. We seek comment on other allocation methods that would produce a basic tier rate reasonable for both subscribers and operators. We seek comment generally on requirements that should be established for design of rates by cable operators seeking to justify rates higher than the benchmark.

APPENDIX C

FEDERAL COMMUNICATIONS COMMISSION

ANNUAL REPORT OF CABLE TELEVISION SYSTEMS

FINANCIAL UNIT DATA

FCC FORM 326, SCHEDULE 1

This is Schedule 1 of YOUR FCC FORM 326. It must be completed and/or corrected and returned to the Commission with Schedules 2 through 5. If the communities listed do not reflect your present consolidation, add or delete as necessary. If the pay cable fee is a "per program", rather than "per month" charge, attach a rate schedule. Include cents with all fee data.

PREVIOUSLY FILED:

SYSTEM COMMUNITIES COMPRISING THIS FINANCIAL UNIT

IDENT

NAME

TYPE

OPERATIONAL STATUS

INSTALLATION FEE

SUBSCRIBER FEE

MONTHLY PAY CABLE FEE

[234] *See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Docket No. 86-111, 2 FCC Rcd. 1298 (1987), paragraph 161 (a)(3)(iii), *recon.* , 2 FCC Rcd 6283 (1987), *further recon*, 3 FCC Rcd 6701'(1988), *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

SCHEDULE 2 CABLE TELEVISION REVENUES AND EXPENSES

FOR PERIOD BEGINNING: 19| | | mo| | | dy| | | ending: 19| | | mo| | | dy| | |

Line No.	ITEM	AMOUNT (OMIT CENTS)
	OPERATING REVENUES	
1	Installation Revenue	||||||||
2	Regular Subscriber Revenue	||||||||
3	Pet Program or Per Channel Gross Revenue (Pay Television)	||||||||
4	Advertising Revenue	||||||||
5	Special Service Revenue	||||||||
6	Other Revenue	||||||||
7	Total Operating Revenues	||||||||
	OPERATING EXPENSES	
	SERVICE EXPENSES:	
	-	
8	Salaries, Wages, and Employee Benefits	||||||||
9	Pole Rentals	||||||||
10	Duct Rentals	||||||||
11	Private Microwave Service (CARS)	||||||||
12	Common Carrier Microwave Service	||||||||
13	Total Tariff (Leaseback) Charges (Applies only to Systems receiving telephone company channel service.)	||||||||
14	All Other Service Expenses	||||||||
15	**PAYMENTS TO PAY CABLE PROGRAM SUPPLIES**	||||||||
	ORIGINATION EXPENSES:	||||||||
16	Salaries, Wages, and Employee Benefits	||||||||
17	All Other Origination Expenses	||||||||
	SELLING, GENERAL, AND ADMINISTRATIVE EXPENSES:	
18	Salaries, Wages, and Employee Benefits	||||||||
19	Franchise Fees	||||||||
20	Copyright Fees	||||||||
21	All Other Selling, General, and Administrative Expenses	||||||||
22	**TOTAL OPERATING EXPENSE**	||||||||
23	**TOTAL OPERATING INCOME**	||||||||
	DEPRECIATION AND AMORTIZATION	
24	Depreciation	||||||||
25	Amortization	||||||||
	OTHER INCOME AND EXPENSES	
	OTHER INCOME	
26	Total Other Income	||||||||
	OTHER EXPENSES:	
27	Interest	||||||||
28	Miscellaneous	||||||||
29	**TOTAL OTHER INCOME (OR LOSS)**	||||||||
30	**EXTRAORDINARY ITEMS**	||||||||

Line No.		
31	**TOTAL INCOME (OR LOSS) BEFORE TAXES**	
	TOTAL ASSETS:	
32	To be entered only for those systems (fewer than 1,000 subscribers) exempted from filing schedule 3.	

SCHEDULE 3 — **BALANCE SHEET INFORMATION**

Line No.	ITEM	
	ASSETS	
	CURRENT ASSETS:	
1	Cash	
2	Accounts Receivable	
3	Other Current Assets	
4	Total Current Assets	
	FIXED ASSETS:	
5	Land and Buildings	
6	Headend	
7	Trunk and Distribution System	
8	Subscriber Devices	
9	Program Origination Equipment	
10	Construction Work in Progress	
11	Other Fixed Assets	
12	Plant Adjustment	
13	Less: Accumulated Depreciation	
14	Total Fixed Assets	
	OTHER ASSETS:	
15	Other Assets	
16	Less: Accumulated Amortization	
17	Total Other Assets	
18	**TOTAL ASSETS**	
	LIABILITIES	
	CURRENT LIABILITIES:	
19	Loans Payable	
20	Accounts Payable	
21	Other Current Liabilities	
22	Total Current Liabilities	
	DEFERRED CREDITS:	
23	Total Deferred Credits	
	LONG TERM DEBT:	
24	Total Long Term Debt	
	OWNER'S EQUITY:	
25	Total Stock Issued	
26	Proprietor's Equity	
27	Retained Earnings	
28	Other Owner's Equity	
29	Total Owner's Equity	
30	**TOTAL LIABILITY AND OWNER'S EQUITY**	
	CHECK METHOD OF DEPRECIATION USED	

(1) Straight line__ (2) Declining Balance__

31 (3) Double Declining Balance__

(4) Sum-of-the-Year-Digits__

(5) Other__

SCHEDULE 4 SUPPLEMENTAL ACCOUNTING INFORMATION

PART A	Amortization term in year	Amortization method used (code)	Amount capitalzed during yr.	Amount amortzed during yr.
1. Deferred System Development Costs			$	$
2. Franchise Costs (recorded as assets			$	&
3. Goodwill			$	$

CODES (1) Straight line (3) Double declining balance (5) Other
(2) Declining balance (4) Sum-of-the-years digits

PART B	Total Capitalized	Amt. capitalized During year	Useful Life years
4. Capitalized Interest on System Construction	$	$	$

PART C	Total Amt. of Asset	Amount NOT Being Amortized	Amount Being Amortized
5. Deferred Sys. Develpmnt.costs	$	$	$
6. Franchise Costs (recorded as assets)	$	$	$
7. Goodwill	$	$	$

PART D	Total Amt. of Allocated Costs	Method Used To Allocate Costs To System Code
8. Overhead Costs Allocated To System	$	$

PART E	Amount
9. Original Cost of Fixed Assets (Seller's Book Value)	$
10. Portion of Purchase Price Allocated to Seller's Book Value	$
11. Recorded Cost of Fixed Assets by Purchaser	$

PART F	Fixed asset classification	Amount	Useful Life Years	Amount	Useful Life Years
12. Estimated Useful Lives of Fixed Assets		$		$	
		$		$	
		$		$	
		$		$	

PART G	Amount	Number of Persons
13. Salaries to Owners	$	
14. Other Direct Payment Included in Total	Total Amount	Type
15. Expense Payments to Spouse or Relatives	$	

16. Expense Payments to Spouse or Relatives |$ | | | |

TYPE| (1) Rent - (3) Payment for equipment (5) Travel & Entertainment
| (2) Payments for services (4) Payments for supplies (6) Other

SCHEDULE 5 EMPLOYMENT

Indicate the number of employees for the work week in which the last day of the Fiscal Year fell. | NUMBER OF EMPLOYEES
|FULL TIME | | | | | | |
|PART TIME | | | | | | | |

CERTIFICATION

THIS REPORT MUST BE CERTIFIED BY THE INDIVIDUAL OWNING THE REPORTING CABLE TELEVISION SYSTEM. IF INDIVIDUALLY OWNED; BY A PARTNERSHIP; BY AN OFFICER OF THE CORPORATION, IF A CORPORATION; OR BY A REPRESENTATIVE HOLDING POWER OF ATTORNEY IN A CASE OF PHYSICAL DISABILITY OF AN INDIVIDUAL OWNER OR HIS/HER ABSENCE FROM THE UNITED STATES.

I CERTIFY THAT I HAVE EXAMINED THIS REPORT, AND THAT ALL STATEMENTS OF FACT CONTAINED THEREIN ARE TRUE, COMPLETE, AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF, AND ARE MADE IN GOOD FAITH.

SIGNATURE |

PRINTED NAME OF PERSON SIGNING | DATE

LEGAL NAME OF RESPONDENT

RESPONDENTS ADDRESS |street address

|city |state |DATE

FCC Form 326

APPENDIX D

PROPOSED FORM FOR LOCAL FRANCHISING AUTHORITY CERTIFICATION

FCC ____ APPROVED OMB _____

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CERTIFICATION OF FRANCHISING AUTHORITY TO REGULATE BASIC CABLE SERVICE RATES AND INITIAL FINDING OF LACK OF EFFECTIVE COMPETITION

(Under 47 C.F.R. _____)

1. a) Name of Franchising Authority:
   b) Address:
   c) Telephone:

2. a) Name(s) and address(es) of cable system(s) within your jurisdiction.
   b) Name(s) of system(s) you claim to be subject to regulation.
   c) Have you served a copy of this form on all parties listed in b?
   Yes__ No__

3) Will your franchising authority adopt and administer regulations with respect to basic cable service that are consistent with the regulations adopted by the FCC pursuant to 47 U.S.C. § 543 (b)?
   Yes__ No__

4) With respect to the franchising authority's regulations referred to in Question 3:

   a) Does your franchising authority have the legal authority to adopt them?
   Yes__ No__
   b) Does your franchising authority have the personnel to administer them?
   Yes__ No__

5) Do the procedural laws and regulations applicable to rate regulation proceedings by your franchising authority provide a reasonable opportunity for consideration of the views of interested parties?
   Yes__ No__

6) Is (are) the cable system(s) listed in 2b subject to effective competition?

(Effective competition means that (a) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; (B) the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or (C) a multichannel video programming

distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.)

Yes__ No__

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-297

In the Matters of

Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service;	RM-7872; RM-7722
Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules;[1]	
Suite 12 Group Petition for Pioneer's Preference;	PP-22
University of Texas - Pan American Petition for Reconsideration of Pioneer's Preference Request Denial	

NOTICE OF PROPOSED RULEMAKING, ORDER, TENTATIVE DECISION AND ORDER ON RECONSIDERATION

Adopted: December 10, 1992; Released: January 8, 1993

Comment Date: March 16, 1993
Reply Comment Date: April 15, 1993

By the Commission:

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I. INTRODUCTION

1. This Notice of Proposed Rulemaking and Tentative Decision (NPRM) proposes a redesignation of use of the 28 GHz band from point-to-point microwave common carrier service to a local multipoint distribution service. In separate sections of this document, we address pending waiver applications in the Common Carrier Point-to-Point Microwave Radio Service filed in anticipation of our action on the instant petitions for rulemaking. (Section IV). In addition, we address two petitions for pioneer's preference, one of which is before us on a petition for reconsideration of the staff's action dismissing the request. (Section V).

2. We initiate this NPRM in response to a petition filed by Suite 12 Group ("Suite 12"), a group of inventors who have engineered a millimeter wave component technology which can be used to offer video and other communications services in the 27.5 - 29.5 GHz frequency range ("28 GHz band"). We have received two other petitions for rulemaking which affect the 28 GHz band. In response to Suite 12's petition for rulemaking, Video/Phone Systems, Inc. (Video/Phone) proposes a Local Wireless Broadband Service (LWBS) for the 28 GHz band in a separate rulemaking petition. In addition, Harris Corporation (Farinon Division) (hereinafter "Harris") filed a petition for rulemaking (RM-7722) suggesting that the Commission implement a uniform channelization plan for the 28 GHz band so that equipment manufacturers would have a standard to apply for the development of new technology.

[1] A list of applications identified to date is provided in Appendix C. Should any further waiver applications be identified in the future, we hereby delegate authority to the Common Carrier Bureau to dismiss them in accordance with the holding in this Order.

3. In this proceeding we propose to accommodate the Suite 12 and Video/Phone requests. The 28 GHz band is virtually unused, and the proposals before us, if developed to their apparent potential, will provide consumers with additional options by which to satisfy video and other telecommunications requirements. Among the primary regulatory objectives of this proceeding are providing applicants in this band sufficient flexibility to satisfy consumer demand, expediting service to the public, making more efficient use of essentially fallow spectrum, and streamlining the licensing process while deterring speculative applications. We propose licensing and regulatory policies that, in our experience, should serve these objectives. We seek comment on proposals to license two licensees in each area; adopt minimal technical rules to accommodate multipoint video programming distribution, wideband video, data, and other telecommunications services; require that service be available to 90% of the residents within a service area within 3 years; adopt one-day-filing; use lotteries or auctions to select licensees; and employ minority and diversity of ownership preferences. We also deny 971 pending waiver applications that seek to establish point-to-multipoint video distribution services without benefit of the instant rulemaking to amend the current Common Carrier Point-to-Point Microwave Service rules.

4. Suite 12's and Video/Phone's proposed redesignation of the 28 GHz band is for a service which meets the generic standards of a multipoint distribution service. However, due to the novel technology which uses a cellular distribution format and a greatly expanded range of services which can be offered, we find that this service is separate and distinct from other types of multipoint distribution services. Accordingly, we propose to title the new service Local Multipoint Distribution Service (LMDS) and propose new rules suited to the technology and distribution format to be used.

II. BACKGROUND

5. The 28 GHz band has been available for point-to-point microwave radio common carrier use since 1959. Nevertheless, until 1991, the only licensees for the 28 GHz band were for a few temporary fixed licenses authorized under Part 21. Very little, if any, common carrier point-to-point use of the frequency band has been made since 1959.[2]

6. In 1991, the Commission authorized a wholly-owned affiliate of Suite 12 to construct a system in the New York Primary Metropolitan Statistical Area (PMSA) using millimeter wave technology to provide video service. *Hye Crest Management, Inc.*, 6 FCC Rcd 332 (1991). The application proposed a new fixed station in the 28 GHz band to provide 24 channel television service in New York City. The licensee, Hye Crest, was granted waivers of Sections 21.108 (directionalization and bandwidth requirements) and 21.700 (status eligibility). Hye Crest also received a designated service area, the New York PMSA. Hye Crest subsequently requested and received authorization for a major modification of its license to change the transmitter type to offer 49 television channels within 1000 MHz of spectrum. Hye Crest filed its Certification of Completion of Construction for its first facility located at Brighton Beach, New York (FCC Form 494A) on July 1, 1992. Hye Crest's authorization is for a five year period. Since granting Hye Crest's initial authorization, we have received 971 applications accompanied by petitions for waiver of the Commission's rules from entities seeking to provide service similar to that of Hye Crest around the nation. On October 29, 1992, the Common Carrier Bureau released an *Order* (*In the Matter of Rulemaking to Amend Part 2 and 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band, and to Establish Rules and Policies for Multichannel Local Distribution Service*, DA 92-1488) announcing that applications in the 28 GHz band would no longer be accepted for filing pending the outcome of the instant rulemaking proceeding.

7. As discussed above, three petitions for rulemaking were filed proposing a variety of uses for the 28 GHz band. The Harris and Suite 12 petitions were placed on public notice[3] for comment; the Video Phone petition was a comment to the Suite 12 petition and was not placed separately on public notice.

8. *Suite 12 Petition*. Suite 12 states that the technology it proposes is "capable of immediately providing interactive high quality video, voice, and data services. . . ." It argues that LMDS will help meet the public demand for additional multichannel video programming and for two-way voice and data service. Suite 12 argues that the public will benefit from having an "innovative and competitive two-way interactive communications system" capable of providing the equivalent of fiber cable service without the need to wire a community. Suite 12 states that its system is capable of incorporating future technological advances such as high definition television and digital communications.

9. The system is a multicell configured distribution system with a return path capability. The video channels (20 MHz) are transmitted over 1 GHz of spectrum with the same polarization. Two-way communication channels are inserted between the video channels and are transmitted with opposite polarity. The system uses an omni-directional antenna to transmit from the node, or center of the cell. The subscriber's receiver antenna uses a narrow beamwidth to eliminate multipath reception and to obtain sufficient link margin for service. Each cell is designed to be between 6 to 12 miles in diameter, and shadowed areas are served with a repeater or reflector. The system avoids interference between adjacent cells by cross-polarizing the signals and by taking advantage of the discrimination provided by the

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[2] We have received an application from Motorola Satellite Communications, Inc. to use 100 MHz within the 27.5 - 30 GHz band for gateway/control satellite uplinks in the fixed satellite service (FSS) to support its proposed "Iridium" low earth orbit mobile satellite service. (File Nos. 9-DSS-P-91(87) and CSS-91-010, Public Notice date April 1, 1991, Report No. DS-1068). In addition, the NASA Advanced Communications Technology Satellite (ACTS) is scheduled to be launched in June or July 1993. This satellite will operate from 100$ W.L. with 29-30 GHz uplinks and 19.2 - 20.1 GHz downlinks. This program intends to provide several services including T-1 VSAT networks within 100 mile radius of several major metropolitan areas on frequencies 29.242 GHz +/- 20.5 MHz, 29.263 GHz +/- 82.5 MHz and 29.298 GHz +/- 20.5 MHz. *See* paragraph 22, *infra*.

[3] Petition for Rulemaking filed by Harris Corporation (Farinon Division), RM 7722, Public Notice Report No. 1845, released May 15, 1991; Petition for Rulemaking filed by Suite 12 Group, RM 7872, Public Notice Report No. 21049, released December 16, 1991.

subscriber receiving antenna. Suite 12 states that its system makes exceptionally efficient use of the frequency spectrum.

10. *Video/Phone Petition.* Video/Phone is supportive of Suite 12's technology but criticizes it for confining its suggested rules only to video programming service, with secondary communications services. Video/Phone proposes that a Local Wireless Broadband Service would respond to the growing demand for video telecommunications services such as videoconferencing, telecommuting, telemedicine, and education. Video/Phone argues that the lack of economic transmission capability at the local loop has heretofore hindered the growth of these services, which it argues, would have been substantial. Accordingly, Video/Phone proposes rules intended to permit flexible use of the 28 GHz spectrum and Suite 12's technology to provide a wide variety of communication services to the public.

11. *Harris Petition.* Harris proposes that the Commission amend Parts 2, 21, and 94 of the Rules to adopt a channelization plan with multiple bandwidth options for the 28 GHz band and to make the band available for assignment to private carriers under Part 94. Harris argues that manufacturers find it difficult to design and market equipment due to uncertainty regarding channel pairings, bandwidths, channel spacings, etc. Harris also argues that the Commission has adopted frequency sharing between private carriers and common carriers. Furthermore, Harris argues that broad eligibility rules will result in greater and more efficient use of the 28 GHz band. Harris argues that the band could be used to facilitate the implementation of personal communications services through the interconnection of microcells. Finally, Harris argues that private radio use should be permitted for the band because, it contends, the Operational Fixed Microwave Radio Service (OFS) bands below the 28 GHz band are heavily used.

12. Harris opposes Suite 12's proposal, arguing that there is an imminent need for point-to-point spectrum. If redesignation is undertaken, Harris suggests that LMDS assignments be limited to one half of the band and the International Radio Consultative Committee (CCIR) channelization plan be implemented so that multiple uses of the spectrum can be made, including point-to-point services. Harris provides no evidence of either manufacturer or subscriber interest in the 28 GHz band for conventional private or common carrier point-to-point use, however.

13. The Wireless Cable Association (WCA) believes that a redesignation is premature. It argues that wireless cable licensees in the Multichannel Multipoint Distribution Service (MMDS) are at a competitive disadvantage because of their limited channel capacity. WCA also argues that the wireless cable operators are at a competitive disadvantage due to expansion of telephone companies into video dialtone, and the entrance of franchised cable operators into two-way voice and data services. It contends lack of available spectrum for wireless cable operators has been a brake to their expansion into both video and two-way communications services. Accordingly, WCA is interested in the use of the 28 GHz band for wireless cable operators. Nevertheless, WCA argues that Suite 12 has failed to produce test results into the record that would establish the viability of its system. Finally, WCA argues that if the 28 GHz band is redesignated for Suite 12's technology, that the public interest may be best served by setting aside spectrum for local wireless cable operators to expand.

III. DISCUSSION

LMDS Demand

14. We believe that the record compiled thus far establishes that 1) the 28 GHz band is not being utilized; 2) Suite 12 and others have demonstrated an interest and ability to use it; 3) the most likely use will be to provide video programming, and that such use will serve the public interest, and 4) we should not limit the use of the band only to video service.

15. Technological advances in the use of radio technology are making possible wider use of spectrum in lower bands and opening use of the higher frequency bands not heretofore possible. One of these advances has been made by Suite 12, which has developed and patented the equipment it hopes to place in subscribers' homes. Suite 12's representations that the proposed redesignation will serve the public interest are supported by its bringing LMDS service to Brighton Beach. In addition, the number of applications received seeking to provide similar service indicates a significant interest in both the technology and the service. Coupled with the volume of public inquiry regarding the service, we find that there is strong public interest in the proposed redesignation.

16. The interest in spectrum for video services, as evidenced by Suite 12's developmental work and the growth of conventional cable subscribership,[4] supports a tentative conclusion that video programming will be the largest and most commercially significant use of this spectrum at this time. Moreover, such use of the 28 GHz band would provide additional competition to franchised cable companies. A new source of competition for franchised cable companies, wireless cable companies, and other video service providers furthers our goal of using the disciplines of the marketplace to regulate the price, type, quality and quantity of video services available to the public. Accordingly, we propose to redesignate the 28 GHz band fixed service allocation to any video or telecommunications use on either or both the vertical and horizontal polarization planes of the assigned frequency, which the public may require in a particular location.

17. We intend that the rules we promulgate in this proceeding reflect the maximum flexibility for licensees to construct communications systems in which the public is interested. Suite 12's technology offers the promise for a wide variety of applications that could be tailored to local interests. In this sense, it responds to Video/Phone's concerns, because the uses for the 28 GHz band it proposes could be incorporated into service capabilities of the multicell technology if local demand warrants. We therefore seek to establish rules that provide adequate spectrum for multipoint video programming distribution services and to

[4] In the last decade, the number of households subscribing to conventional cable television service has increased from 21 million in 1982 to 53 million in'1992. 1992 *Television and Cable Fact Book*, Cable and Services Vol. 60, p. G-64.

provide sufficient flexibility to accommodate different types of point-to-point and point-to-multipoint communications services.

18. WCA's concern that licensees in the Multichannel Multipoint Distribution Service will face undesirable competition during its start-up period is unsupported. The existing industry has had a *de facto* head start which moots WCA's concern. We have granted more than 900 applications for wireless cable licenses to date, while potential LMDS licensing awaits this rulemaking proceeding, and video dialtone applications are only now being filed. Thus, MMDS wireless cable systems have had, and will continue to have, a significant opportunity to develop and refine their services and to establish market position.

19. WCA proposed that we set aside a portion of the 28 GHz band for MMDS operators because one of the obstacles facing the MMDS industry is acquiring enough spectrum to provide a service competitive with the franchised cable systems. We do not perceive a compelling public interest justification for setting aside 28 GHz spectrum for MMDS system operators.[5] We have recently allocated additional spectrum for wireless cable operators. *Second Report and Order*, Gen. Docket No. 90-54, 6 FCC Rcd 6792 (1991). We also have proposed rule changes to expedite processing. *Notice of Proposed Rulemaking* in PR Docket No. 92-80, 7 FCC Rcd 3266 (1992). Accordingly, we do not propose to set aside any portion of the 28 GHz band for MMDS licensees, but we invite comments to address this tentative conclusion, focussing particularly on whether the public interest would be served by a set-aside.[6]

Structure of 28 GHz Band

20. We propose, in accordance with Suite 12's and Video/Phone's suggestion, that the 28 GHz band initially be licensed in two blocks of 1000 megahertz each to two different carriers. Each assignment will be optimized on a cell by cell basis, for video services on the one (horizontal/vertical) polarization, and for other services on the other (vertical/horizontal) polarization. Suite 12's patented technology, the only equipment which appears to be capable of providing direct customer services in the 28 GHz band at this time, uses channels of 20 MHz to provide video service. Since it appears that video service will be, at least initially, the primary service offered in LMDS, we propose to divide each 1000 megahertz band into channels of 20 MHz each; licensees of the respective blocks will then have flexibility to use or lease portions of one or both polarization directions in each cell and to provide a wide variety of services. Thus, each licensee will be able to provide a minimum of 49 video programming channels to the public using the full 1000 megahertz assignment on one polarization direction in each cell. Licensees will also have the opportunity to supplement their video programming with telecommunications services (such as point to multipoint video, data or telephony services) on the full 1000 megahertz assignment by using the opposite polarization from the video service, and by using frequency offsets and the multicell point-to-multipoint distribution structure. This channelization plan provides licensees the flexibility to offer different telecommunications services in every cell in the designated authorized area to meet the demands of the marketplace for these services. The 27.5 - 28.5 GHz band will be designated the "A-Band," and the 28.5 -29.5 GHz band will be designated the "B-Band." We seek comment on this assignment scheme.

21. We also seek comment on whether other assignment schemes might better meet our objectives. For example, four blocks of spectrum could be assigned to different licensees instead of two blocks. In this scheme, two larger blocks of spectrum, enough to offer about 34 video channels, could each be assigned to new licensees for LMDS video programming services, and the two smaller blocks of spectrum could each be assigned to other users, possibly to applicants proposing only telecommunications services or a smaller video system. Other assignment schemes may also offer the possibility of providing either additional video programming competition or telecommunications options for subscribers as needs and markets develop in an area.

22. We also seek comment on whether a separate assignment is specifically required to accommodate the proposed satellite service applications in this band or whether adequate coordination and sharing criteria could be developed to permit both terrestrial and fixed satellite services to operate compatibly in the band. None of the commenters discussed existing or proposed satellite use of the band. Normally the Fixed Satellite Service can share with point to point services in an area, as evidenced by the successful sharing of the 4/6 GHz band. However, the multicell multipoint configurations in this proposal envision a wide area distribution of services which may foreclose the possibility of acceptable sharing conditions between satellite and terrestrial services. Proposed satellite use (*see* note 1, *supra)* is focused in the B-Band (28.5 - 29.5 GHz) segment.

Technical issues

23. The Commission's technical regulations have in the past provided guidance to manufacturers as to the minimum specifications necessary for equipment type acceptance or certification for service. In addition, technical regulations are designed to ensure minimum service performance and facilitate spectrum management, interference control and coordination among individually licensed stations nationwide. Each licensee would have control over its own facilities within its designated service area and would therefore be responsible for minimum service performance and interference levels within its system. The licensee, however, may need to coordinate its operations with other entities licensed to provide service in adjacent designated areas to avoid mutual interference situations. Hence, we must establish regulations to facilitate interference control, spectrum management and coordination at the designated service area interfaces. In addition, coordination require-

[5] In the Domestic Public Cellular Radio Telecommunications Service (DPCRTS), the Commission set aside one-half the available spectrum for assignment to Local Exchange Carriers (LECs or wireline carriers) upon a finding of compelling public need for a wireline set-aside. *Cellular Lottery Order*, 98 FCC 2d 175 (1984).

[6] The University of Texas has requested that we consider reserving one-half the available 28 GHz band for educational use. Accordingly, we also seek comment on the probable relative demand of commercial video entertainment programming and educational or other non-commercial programming on the 28 GHz band and whether the Commission should consider reserving one-half of the spectrum for non-commercial use.

ments and sharing criteria may need to be developed to reflect satellite use. Overall, however, we have an opportunity to be less restrictive in developing technical standards and to promote flexibility for the licensee to meet market demands of the consumer in the designated service area. Although we propose 20 MHz channels for licensing purposes, once licensed, the licensee would not be restricted to specific bandwidth, emission characteristics, etc. and could change the traffic mix within the frequency assignment to meet the requirements of the individual community served by a cell or multiple cells.

24. The three petitions propose a wide range of technical regulations, from a very detailed channelization plan with multiple bandwidth options to a more flexible approach which envisions no restrictions on bandwidth, channelization plan, emission or modulation characteristics. Since the petitions propose to provide licenses for stations over a limited geographical area corresponding to metropolitan statistical areas, they propose some restrictive technical standards and regulations. Given the propagation characteristics of the band, we believe only limited technical regulations may be needed to insure adequate interference control and coordination of services at the interfaces of the designated service areas within each 1000 MHz spectrum block.[7] We seek comment on the need for technical standards, if any, and specific proposals for power, modulation requirements, channelization, bandwidth, emission characteristics, frequency stability, antenna characteristics, gain, beamwidth, height and polarization and spectrum utilization, as appropriate. We recognize the need to protect stations operating outside the frequency band. The emissions limitations in Part 21 appear to be sufficient to meet this concern. Spectrum utilization would address any questions of spectrum efficiency including minimum standards that should be enforced and how these standards should be determined. Parties should also consider whether technical rules should be adopted to accommodate existing and proposed satellite use of the band.

Regulatory/Licensing Issues

25. *Status of Licensees.* Suite 12 suggested that the Commission authorize video service distributors in the 28 GHz band as non-common carriers, while Video/Phone proposed that parties be allowed to elect either common carrier or non-common carrier status. In *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C.Cir. 1976), the United States Court of Appeals for the District of Columbia Circuit defined a non-common carrier as one whose practice is to make individualized decisions, in particular cases, whether and on what terms to deal, and who is under no compulsion to offer its services indifferently. A common carrier is one which holds itself out indifferently to serve those who seek to avail themselves of the carrier's particular services, or is under a legal compulsion to do so.

26. We have allowed service providers to elect common carrier or non-common carrier status in a number of radio services licensed by the Commission. For example, we have allowed licensees of satellite transponders to provide service as a non-common carrier entity. We also have allowed Multichannel Multipoint Distribution Service licensees to choose their own status. We have found that doing so furthers the Commission's goals of ensuring that the communications needs of the public are met by allowing marketplace forces to shape the development of service providers. *See, e.g., Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984); *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982); *Revision to Part 21, Report and Order*, 2 FCC Rcd 4251, 4253 (1987). As we have done with MMDS, we propose that LMDS licensees choose whether they will operate as a common or non-common carrier on a channel-by-channel and/or cell-by-cell basis. We request comments on this issue, with particular emphasis on the effects status election would have on consumers.[8] We also invite comment on the basis on which the selection should be made. In addition, we seek comment on whether the non-video services provided by LMDS licensees should be regulated as common carrier services,[9] and on the jurisdictional implications of allowing election by a local exchange carrier of non-common carrier status in the proposed service.[10]

27. *Regulation of Common Carriers.* We tentatively propose that LMDS operators electing common-carrier status for part or all of their systems should be classified as "non-dominant" carriers, and subject to streamlined tariff regulation as with MMDS.[11] A non-dominant carrier is one which has insufficient market power to practice anti-competitive pricing. *Id.* Although we propose to reallocate a large quantity of spectrum to LMDS, and to assign each operator one gigahertz of spectrum, we tentatively conclude

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[7] Coordination is required within the border areas with Canada and Mexico. We believe that in these circumstances regulations would be required to coordinate with our neighbors individual stations within 56 km of the border to insure interference protection to and from stations across the border.

[8] With regard to notification of status election, parties should note the process currently used by MMDS licensees (47 C.F.R. § 21.900, ff.). We request interested parties to comment on the usefulness of these procedures for LMDS licensees.

[9] *See* In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rulemaking (Gen. Docket No. 90-314, ET Docket No. 92-100) 7 FCC Rcd. 5676 (1992). We also seek comment on the application of our video dial tone policies to common carriers providing video services over LMDS.

[10] To the extent that LMDS could be used as a resold telephone service, the Commission has determined that, under Section 332 of the Communications Act, a private land mobile radio licensee may not resell interconnected telephone service for profit. Amendment of Part 90 of the Commission's Rules to Prescribe Policies and Regulations to Govern the Interconnection of Private Land Mobile Radio Systems, 93 FCC 2d 1111, 1115 (1983), *on recon.*, 49 Fed. Reg. 26066 (1984), *aff'd by judgement sub nom.* Telocator v. FCC, 764 F.2d 926 (D.C. Cir. 1985) (Table); In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, - FCC Rcd - (1992), Gen. Docket No. 90-314, (Notice of Proposed Rulemaking and Tentative Decision) paras. 97-98, note 64. Accordingly, we ask for comment on this issue, in particular, whether LMDS could be classified as a resold telephone exchange service, whether LMDS licensees may operate as private land mobile radio licensees, and what implications operation of such resold telephone service by local exchange carriers (or others) operating as LMDS licensees would have.

[11] History and prior citations noted in Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities (Sixth Report and Order), 99 FCC2d 1020 (1985), *rev'd and remanded sub. nom*, MCI Telecommunications Corporation v. FCC, 765 F.2d 1186 (D.C. Cir. 1985); *vacated in part*, AT&T v. FCC, No. 92-1053 (D.C. Cir., November 13, 1992). Commenters should discuss the implications of our competitive carrier policies for participation in LMDS by telephone companies.

that both video and telecommunications services are so well represented in the marketplace that no LMDS operator will have a monopoly or near-monopoly position. For example, in the video distribution market, LMDS faces competition from MMDS, cable television, low-power television, domestic fixed satellites and broadcast television stations. *Revisions to Part 21, supra.* The telecommunications market includes long-distance telephone service, local exchange service, fixed cellular services, fixed satellite communications, private carriers, and Personal Communications Systems (PCS). Accordingly, it appears that LMDS, while it may find a market niche in particular areas, is unlikely to develop into a monopoly service. Should it do so, we could reassess its regulation.

28. *Preemption.* For LMDS licensees choosing non-common carrier status, "[p]reemption is primarily a function of the extent of the conflict between federal and state and local regulation." *In the Matter of Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities,* 101 FCC2d 952, 959 (1985). To the extent such systems provide video entertainment programming, we tentatively conclude that state entry and rate regulation should be preempted. Beyond that, at this stage, the record in this proceeding does not contain any information regarding the extent to which state and local regulations might conflict with provision of LMDS. State law which conflicts with the federal provisions must be preempted. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963); however, we require a factual record on this subject prior to making any final preemption determination. Based on the rules proposed herein, and any additional rules, especially of a technical nature suggested by commenting parties, we request comment on the extent to which the Commission may be required to preempt state entry and/or rate regulation of LMDS licensees choosing non-common carrier status.

29. For LMDS licensees choosing to maintain common carrier status, this Commission can preempt state regulation of video service since it is inherently interstate in nature. *United States v. Southwestern Cable Co.,* 392 U.S. 157, 168-169 (1968); *New York State Commission on Cable Television v. F.C.C.,* 669 F.2d 58, 65 (2d Cir. 1982). However, for LMDS licensees providing common carrier telecommunications services, we have jurisdiction only over interstate portions of those services, unless the intrastate services are not severable from the interstate services, and the state regulations thwart or impede federal law and policies. *See, e.g., Louisiana PSC v. FCC,* 476 U.S. 355, 375 n.4 (1986); *National Association of Regulatory Utility Commissioners v. FCC,* 880 F.2d 422 (D.C. Cir. 1989); *Computer III Remand Proceedings,* 6 FCC Rcd 7571, 7625-7637 (1991); *Mobile Telecommunications Technologies Corporation,* 7 FCC Rcd 4061 (1992). Accordingly, for LMDS telecommunications services, the first question we must consider in this proceeding is whether LMDS telecommunications services can be severed into intrastate and interstate components. If they cannot be severed, the Commission must show on a factual basis that potential state regulation would thwart or impede the Commission's interstate regulatory objectives for LMDS. Having incomplete technological information on the manner in which LMDS systems will operate, we are not in a position to determine at this time whether it is appropriate to preempt state entry and/or rate regulation of common carrier LMDS. Moreover, we do not have evidence that any particular state regulatory policies regarding inseverable intrastate LMDS services would thwart or impede our efforts in establishing this new service. We request that parties, especially Suite 12 as the system inventor, and Video/Phone as the proponent of using the 28 GHz band for telecommunications services, provide information regarding the structure of system operations in light of our need to determine the interstate/intrastate nature of potential telecommunications services, and on whether any preemption of state regulation of intrastate common carrier non-video services is necessary.

30. *Service Areas.* We propose to license LMDS by the 487 "Basic Trading Areas" (BTAs) identified in the Rand McNally *1992 Commercial Atlas and Marketing Guide,* 123d edition, pp. 36-39 plus Alaska and Puerto Rico, for a total of 489 regional licenses encompassing all land areas within the United States. In *Personal Communications Services* - FCC Rcd - (1992), Gen. Docket No. 90-314, paragraphs 56 - 61 (Notice of Proposed Rulemaking and Tentative Decision) (PCS NPRM) we discussed the relative benefits and drawbacks of smaller and larger service areas in connection with Personal Communications Services (PCS). Although PCS and LMDS are not necessarily similar services, a number of the considerations discussed in the PCS NPRM regarding BTAs as one of several options posed for that service may apply to LMDS as well. In particular, we are interested in facilitating natural market area licenses in order to achieve three goals. First, the Basic Trading Areas comprise areas within which consumers have a community of interest. Their use for licensing purposes reinforces this identity; a different scheme may not. Second, we wish to maximize the competitive strength of LMDS stations in order to provide as much competition in video distribution and telecommunications services as possible. We noted in *Personal Communications Services* that the cellular industry might have benefitted from larger initial licensing areas, since many licensees have expended large sums to combine metropolitan area and rural area licenses in consolidated systems. On the other hand, the costs associated with marketing and providing a new collection of LMDS services to the public may be prohibitive in larger population or geographic areas. We seek to find an appropriately-sized service area for LMDS in order to take advantage of economies of scale necessary to support a successful enterprise. Finally, we hope to facilitate applications processing. BTAs provide an easily identifiable and manageable number of discrete filing areas covering all areas of the country. Parties may also consider as alternatives to BTAs the 47 "Major Trading Areas" identified in the Rand McNally guide, *supra,* or smaller, cellular-type metropolitan and rural service areas, or Areas of Dominant Influence (ADI).

31. We request comment on the alternative proposals. Commenters should focus on the economies likely to be encountered with LMDS, both video and telecommunications services; the comparative costs of building LMDS systems in smaller and larger service areas; which type of licensing would be most likely to best serve expeditiously the needs of rural areas; and which approach would enhance speed of service to the public. Parties are invited to comment on the competitive implications of each alternative.

32. *Service of minimum areas and/or populations.* In order to ensure that licensees fulfill their responsibility to use the radio spectrum efficiently and provide the best possible service to the public, we propose that within three years of being granted a license, licensees shall be capable of pro-

viding LMDS service to at least 90% of the population residing within the service area. We request comments on this proposal and welcome alternative suggestions.

33. *Cross-Ownership.* We do not propose to adopt cross-ownership restrictions unique to 28 GHz service. The Commission has imposed such rules in a variety of radio services (*e.g.,* cable television cross ownership limitation in the Multichannel Multipoint Distribution Service) to limit the ability of firms having market power from exploiting that position to engage in activity that restricts output, results in uneconomic pricing, or otherwise would deprive consumers of the full benefits of new entry. The evidence before us suggests' that the most likely first use of the 28 GHz band will be video entertainment programming, given Suite 12's experience and developmental activities. There is no assurance this will be the case, or that even if it is the predominant use, that it will be the most viable use in all geographic areas. In view of this uncertainty, we are inclined not to exclude any existing video distribution or telecommunications firm from constructing and operating 28 GHz facilities. We seek comment on our tentative policy conclusion that cross-ownership restrictions should not be imposed.

34. On the other hand, the recently-adopted Cable TV Consumer Protection and Competition Act of 1992, P.L. 102-385, Section 11, generally prohibits cable operators from holding a license for "multichannel multipoint distribution service" in their own franchise areas. Although LMDS is not the Multichannel Multipoint Distribution Service, the two services have many similarities, including the method of product distribution. Accordingly, it appears that the intent of Congress to facilitate competition in the video distribution services would include a ban on cable ownership of LMDS licenses if used to distribute video programming.[12] We solicit parties' comments on the interpretation of the cross-ownership prohibition on MMDS in the Cable Act as it applies to LMDS, and our tentative policy conclusion not to impose cross-ownership restrictions.[13]

35. *Selection from among mutually exclusive applicants.* The two traditional choices available for choosing from among mutually exclusive applicants are comparative hearing and random selection. A third option, competitive bidding, may be available if Congress enacts enabling legislation. Comparative hearings may be either full administrative hearings or expedited hearings conducted primarily through a written record. Full administrative hearings are extremely costly and time-consuming. Expedited "paper" hearings, while not as costly in time and resources as full administrative hearings, are nevertheless cumbersome. For example, proceedings to license the top-30 cellular markets through expedited hearing procedures took approximately two years.

36. Because of our interest in making as many innovative, competitive services available to the public as quickly as possible, we propose to use random selection, or competitive bidding, if authority is provided by Congress, to choose among any mutually exclusive LMDS applications. We request comments on which method would be best suited to this service. We also ask for comment on the specific form any lotteries should take. In our recent Notice of Proposed Rulemaking for the PCS service, we discussed ways in which the lottery system could be improved. We also asked questions on how to implement competitive bidding. *PCS NPRM, supra,* paras. 84 - 91. We ask for comment on these options in the context of this service.

37. *Preferences.* The Communications Act requires the Commission to ensure that any system of random selection "used for granting licenses or construction permits for any media of mass communications" gives significant preferences to applicants who own few other such licenses or who are members of a minority. 47 U.S.C. § 309(i)(3)(A). The Communications Act defines "media of mass communication" to include multipoint distribution service, "and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee." 47 U.S.C. §309(i)(3)(C)(i). Accordingly, since LMDS appears to be a medium of mass communications, we tentatively conclude that preferences for diversity and minority interests are appropriate for LMDS. We request comment on this issue.

38. *Settlements.* Settlement between mutually exclusive applicants may avoid the need for comparative hearing or random selection procedures and reduce administrative burdens, delay and expense. *See, e.g., Second Report and Order,* Gen. Docket No. 80-112, 50 Fed. Reg. 5983-01, para. 41 (February 13, 1985) (*MMDS Lottery Order).* However, our experience with cellular and MMDS licensing has shown that this purpose has not always been served by permitting settlements. To the contrary, the opportunity to settle is often perceived as making an application a "sure thing" in a game of chance, thus drawing thousands of insincere applicants hoping to profit from merely filing. Accordingly, the settlement rules have not promoted the public interest in licensing entities prepared to serve the public with needed communications services.[14] Thus, we propose to forbid any settlements among applicants for LMDS, and any alienation of interest in an application for LMDS. The rule we propose herein is based on the Part 22 Domestic Public Cellular Radio Telecommunications Service rule barring any alienation of interest in an application, and requires that each applicant file an independent, individual application. We welcome comment on our proposal.

39. *License Term and Transfer of Control/Assignment.* To further ensure that only sincere applicants interested in constructing and operating LMDS systems apply, we propose that licensees be barred from transferring an LMDS license until the system has been constructed, and in fact is serving the public.

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[12] We also request parties' comments on the question of whether local exchange carriers operating as wireless cable companies on LMDS would have anti-competitive implications and if so, what regulatory responses would be appropriate.

[13] To the extent that LMDS operators will provide video services, LMDS may be a "multichannel video programming distributor" under the Cable Act, Section 2(c)(12). If so, LMDS operators would have to comply with certain regulations that the FCC may adopt consistent with that Act. Interested parties may want to participate in those Cable Act proceedings. In particular, parties should review the Notices of Proposed Rulemaking in MM Dockets 29-259 and 92-264.

[14] Settlement rule changes have been proposed to reflect this new policy in *Revision of Part 22 of the Commission's rules governing the Public Mobile Services,* 7 FCC Rcd 3658, 3665 (1992).

40. Finally, because this is a new and unproven service, we propose a five-year license term. Renewal applications will permit the Commission to monitor the evolution of the service. We propose to adopt renewal expectancy rules and request comment on the details of such rules. We request comments on this proposal, and on whether a license term of ten years would be more appropriate for this service.

41. Our proposals herein are similar to the rules adopted in *Interactive Video and Data Services*, 7 FCC Rcd 1630 (1992) (*IVDS*), *recon pending*. Our objective is to avoid having numerous applications filed by entities having no intention to provide service, but who only hope to profit from the transfer of an authorization. These insincere applications impose tremendous burdens on the Commission in terms of absorbing applications processing staff resources associated with extension of time requests and other filings designed to retain the license while the licensee tries to market the authorization. We ask commenters to consider our objective of limiting applicants to those ready, willing and able to provide service to the public.

42. *Application requirements*. We propose to adopt rules for application requirements similar to those used for cellular applications. Although these requirements demand vigilance and careful preparation on the part of applicants, the public interest is served because fewer processing delays contribute to licenses being made available as quickly as possible.

43. We propose that the standard to be met for LMDS applications be the "letter perfect" standard, rather than the present Part 21 standard of substantial compliance and opportunity to amend. The latter standard has proved to be administratively burdensome and may have contributed to delays in licensing MMDS stations. Accordingly, LMDS applicants not meeting the proposed rule's requirements would be dismissed rather than, under the current Part 21 practice, being allowed to perfect their applications. We propose that detailed review occur after a lottery is held. Parties are invited to comment on this proposal, with particular emphasis on expeditious licensing of qualified applicants.

44. As an alternative, we request comment on whether a "post-card" application, requiring minimal information about the applicant, would be appropriate for LMDS. No technical or financial information would be required to enter the random selection procedure; however, the applicant would be required to certify that it complies with all eligibility rules. Applicants chosen as tentative selectee would have 30 days to file a complete, letter-perfect application for the Commission's consideration.

45. *One-to-a-Market*. As with cellular licensing, we propose that only one application per market area could be filed by each applicant. We propose that no interest, direct or indirect, would be permitted in another application for the same market, including pre-existing settlement agreements or understandings, which in any event we propose to prohibit. Interests in *bona fide* publicly-held corporations of less than one percent would not be cognizable interests for the purpose of this proposed rule. Parties are invited to comment.

46. *Financial showing*. Due to the large amount of bandwidth which each licensee would receive, and the responsibility each licensee would have to serve a large area, we believe that applicants should give an indication of their'financial qualifications to construct and operate their proposed system. We propose to require applicants to meet the "firm financial commitment" standard which has been required of cellular applicants below the top 120 markets.

47. We propose that applicants be required to provide a proposal of service for 90% of the population within the service area within 3 years, a detailed business plan for meeting their plan of system construction and operation, and a showing of a firm financial commitment to construct the three year plan and to operate for one year after complete construction without additional revenue. Parties are invited to comment on this proposal.

48. *Construction Requirement*. To ensure that the public is served expeditiously, we propose to establish construction completion benchmarks. We propose to require that licenses be conditioned on constructing the system within three years of the date of license grant. Whenever any portion of the system is ready to begin operation, the conditional licensee must file a Form 494A, Notification of Completion of Construction. Thereafter, the licensee need not file any additional notifications until the entire system is constructed. At that point, a letter notification must be filed on or before the third anniversary of license grant. We do not propose to grant extensions of this requirement. We invite comment and further suggestions.

49. *Filing Date*. We propose to establish a one-calendar-day filing opportunity for initial LMDS applications. We intend to announce a single date on which applications for each market area can be filed. This procedure would allow processing to go forward smoothly, with the Commission having foreknowledge of the amount of resources required to handle a known number of applications after the filing is completed. In addition, avoidance of the 60-day cut-off rule used for some other Part 21 applications will reduce the risk of "cookie-cutter" applications, *i.e.*, mere copies of earlier filings, by insincere applicants. In addition, processing should be expedited due to the shortness of the filing period -- the public would not have to wait any additional time for the cut-off deadlines to pass. We do not propose to reopen the filing period until all first round applications are processed. Parties are invited to comment.

50. *Fees*. Section 8(a) of the Communications Act sets forth fees the Commission may assess and collect for filing applications to aid in recovering some of its administrative costs. Because this service is a type of multipoint distribution service, the Multipoint Distribution Service (MDS) fee structure applies. In MDS, a licensee pays an initial fee of $155 per station for a conditional license and $455 per radio channel per station when certifying that construction has been completed. LMDS, as proposed herein, will accommodate 50 channels using Suite 12's technology. Thus, each LMDS applicant would pay $155 per station in its single application for the blanket license for fifty channels in either the A-Band or the B-Band. In addition, upon completion of construction of one or more initial cells, a fee of $455 for each of the fifty 20 MHz channels, or $22,750, would be payable. No further fee would be due for constructing the remainder of the proposed LMDS system.

IV. PENDING APPLICATIONS

51. We are also hereby denying the 971 waiver applications pending before us. All are based on existing point-to-point rules which are not structured to address the large amount of spectrum being allocated to individual licensees, nor the service area concept proposed herein, nor the

technical parameters, yet to be developed, of the new service. Instead, they seek waivers similar to those granted in *Hye Crest Management, Inc.*, para. 6, *supra*.

52. In *Hye Crest Management*, the Commission found that a formal rulemaking proceeding permanently reallocating the 28 GHz band for point-to-multipoint services would be premature. The Commission stated that grant of the waiver would not lead to a *de facto* reallocation of the band, and, based on similar waivers in the past, that it did not anticipate "an onslaught of waiver requests." *Id.* at 334. Applying the waiver standard established in *Big Bend Telephone*, 2 FCC Rcd 2413 (1986), the Commission found the waiver standard had been satisfied because "(3) the proposed use of the frequencies will not be detrimental to their assigned users;" 6 FCC Rcd at 334, para. 20.

53. Granting the several hundred waivers before us would amount to a *de facto* reallocation of the 28 GHz band, would be inconsistent with the Commission's suggestion that it would not grant a flood of such requests, and would be detrimental to the assigned users (potential common carrier point-to-point applicants) because spectrum awarded to waiver applicants would not be available to those assigned users. Large scale waivers also would run afoul of the guidance provided by the courts to the Commission in considering waivers, *e.g.*, that they not undermine the purpose of the rule being waived. *WAIT Radio*, 418 F.2d 1153 (D.C. Cir. 1969). We also see no basis for distinguishing among any of the individual requests in an equitable fashion.

V. PIONEER'S PREFERENCE

54. *Background.* The Commission's pioneer's preference rules are a means of recognizing, in the Commission's licensing process, parties that develop new communications services or technologies. The underlying rationale for such rules is to foster the development of new services and improvements to existing services by reducing for innovators the delays and risks associated with the Commission's licensing processes. Innovators of substantial new communications services and technologies have an opportunity to participate either in the new services that they took a lead in developing or in existing services with regard to which they took a lead in promoting application of new technologies.[15]

55. For each request before us, we have evaluated (1) whether the requester has demonstrated that its proposal constitutes a significant communications innovation; (2) whether it has made a significant contribution "in developing that innovation; and (3) whether the innovation reasonably will lead to establishment of a service not currently provided or substantially enhance an existing service. In applying these criteria, we employ the pioneer's preference standards set out in our rules and applied in our previous tentative decisions that consider award of pioneer's preferences.[16] We consider whether a proposal is "to provide either a service not currently provided or a substantial enhancement to an existing service[17] by evaluating factors that include, but are not limited to, (1) added functionality; (2) new use of spectrum; (3) changed operating or technical characteristics; (4) increased spectrum efficiency; (5) increased speed or quality of information transfer; (6) technical feasibility; and (7) reduced cost to the public. In addition, to be eligible for a tentative award, at the time of the tentative decision a requester must have either received an experimental license and reported at least preliminary results, or submitted a written showing that demonstrates the technical feasibility of its proposal.[18]

56. Two pioneer's preference requests were filed in this proceeding. The first, filed by Suite 12, was accepted and placed on public notice on December 16, 1991. Comments and reply comments were received in January 1992. The second, filed by the University of Texas - Pan American (UTPA), was submitted on May 1, 1992 and dismissed on June 18, 1992 for failure to include the information required by the pioneer's preference rules and which is necessary for a full and fair analysis of pioneering proposals. UTPA filed a petition for reconsideration on July 20, 1992.

57. *Suite 12 Petition for Pioneer's Preference.* Suite 12 requests a pioneer's preference as the innovator and developer of a new multichannel distribution technology -- the CellularVision system -- that is capable of providing multichannel one-way and two-way video, voice, and data services. Suite 12's companion petition for rulemaking to authorize LMDS in the 28 GHz band is based on its new multichannel distribution technology.

58. According to Suite 12, if authorized, LMDS will be the first wireless telecommunications service to employ millimeter wave transmissions on a point-to-multipoint basis and will offer one-way and two-way voice, video, and data applications within the same band of frequencies. Suite 12 states that the CellularVision system will be spectrum efficient because it will use cross-polarization isolation between adjacent cell transmitter sites -- transmitters at one cell will use vertical polarization and the adjacent cell transmitters will use horizontal polarization. Suite 12 asserts that in this manner the same frequencies will be used to connect adjacent cell sites, for the transmissions to subscribers, and for response channel transmissions from subscribers to cell sites.

59. Suite 12 asserts that it has undertaken detailed experimental programs to test its technology and that these experiments confirm that its equipment is fully functional and can be produced at costs that make LMDS economically feasible on a mass market basis.[19] It says that work on a prototype system began over six years ago and has culminated in the development of low cost, mass quantity production receivers and the building of transmitters.

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[15] The pioneer's preference regulations are codified at 47 C.F.R. §§ 1.402, 1.403, and 5.207. *See Establishment of Procedures to Provide a Preference*, Report and Order, 6 FCC Rcd 3488 (1991), *recon. granted in part*, 7 FCC Rcd 1808 (1992), *further recon. pending*.

[16] *See, e.g.*, Amendment of the Commission's Rules to Establish New Personal Communications Services, *supra*, paras. 143-195.

[17] 6 FCC Rcd 3488 at para. 49.

[18] *Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites*, Tentative Decision, 7 FCC Rcd 1625 at para. 13 (1992); *Establishment of Procedures to Provide a Preference*, Reconsideration Order, supra, 7 FCC Rcd 1808 (1992), further recon. pending.

[19] These efforts are described in Suite 12's experimental license file, call signs KA2XLG and KA2XVG.

60. WCA opposes Suite 12's request for a pioneer's preference. WCA questions the feasibility of Suite 12's proposal, contending that substantial doubts exist as to the viability of Suite 12's system in the marketplace. In WCA's view, until those doubts are resolved, the Commission would be premature to award Suite 12 a pioneer's preference. WCA also argues that Suite 12 received what is tantamount to a pioneer's preference when the Commission granted Suite 12's wholly-owned affiliate, Hye Crest Management, a license (by waiver) to construct a one-way video transmission system using the 28 GHz band in the New York Primary Metropolitan Statistical Area (PMSA).

61. In replying to WCA's opposition, Suite 12 argues that a report prepared for Suite 12 by the David Sarnoff Laboratories provides a comprehensive technical description of the viability of Suite 12's technology based on tests that the Sarnoff Laboratories performed. According to Suite 12, more than 50 companies and individuals have witnessed demonstrations of Suite 12's LMDS technology, and virtually all have felt sufficiently confident in its technical and market viability to seek licenses from Suite 12 to use it.

62. Suite 12 also maintains that Hye Crest's license is not tantamount to a pioneer's preference grant to Suite 12 because the waiver permits only a one-way video service. Because LMDS technology is capable of two-way voice and data applications in addition to one-way video, Suite 12 argues that it is seeking a pioneer's preference for a different and more sophisticated service than is the subject of the Hye Crest waiver. Suite 12 maintains that regardless of whether LMDS is viewed as a substantial enhancement of the service offered by Hye Crest or as a new service in its own right, it warrants a pioneer's preference.

63. *Decision.* The record demonstrates that Suite 12 is the innovator of LMDS technology and that other companies are seeking licenses to provide LMDS based on Suite 12's pioneering work. No party has challenged Suite 12's claims regarding its developmental efforts. Further, the rules proposed herein are based substantially on Suite 12's proposals in its petition for rule making. While WCA correctly observes that LMDS remains to be tested in the marketplace, the same is necessarily true of most technologies or services for which a pioneer's preference is considered. Therefore, we tentatively conclude that Suite 12 should be awarded a pioneer's preference.

64. Regarding WCA's concerns about Suite 12 already having received the equivalent of a pioneer's preference in the New York PMSA, we disagree with Suite 12 and believe that the service provided by Hye Crest in the New York City area is not substantially different from the service requested by Suite 12 for a pioneer's preference. While Suite 12 is eligible for a pioneer's preference for its proposal in this proceeding, we emphasize that a pioneer's preference for LMDS will not be awarded in more than one service area. Consequently, if a tentative preference to Suite 12 is confirmed, we will modify the authorization to Hye Crest to meet the service area, frequency, and other technical rules developed in this proceeding for the area encompassing Hye Crest's New York PMSA authorization. Alternatively, if Suite 12 informs the Commission that it prefers a preference in the Los Angeles area,[20] and that Hye Crest will surrender its New York PMSA authorization at the time of issuance to Suite 12 of any LMDS license for the service area encompassing Los Angeles, we will grant it a preference for Los Angeles.

65. For the above reasons, we tentatively conclude that Suite 12 should be awarded a pioneer's preference in either the New York or Los Angeles area. If the tentative preference is confirmed and Suite 12 is otherwise qualified, it would be the only eligible applicant for one of the frequency blocks for its preferred service area.

66. *UTPA Petition for Reconsideration.* In its pioneer's preference request UTPA stated that it plans to employ LMDS technology "to ameliorate a critical lack of educational opportunities for the residents of the Rio Grande Valley of Texas."[21] Specifically, UTPA proposes to employ LMDS in the Rio Grande Valley to provide two-way point-to-multipoint video distribution of various educational material. UTPA's petition was dismissed for failure to describe or otherwise document its role in having developed a specific distinctive innovation or new technology. The dismissal states that proposing a series of applications for a new technology developed by another party, in and of itself, does not meet the requirements for award of a pioneer's preference.[22]

67. In its petition for reconsideration, UTPA contends that "innovative *applications* of technical systems -- applied technology -- are often truly revolutionary and may, in any number of ways, affect quality of life even more significantly than the development of the underlying system."[23] UTPA also maintains that its proposal would extend the potential of LMDS to a more advanced or effective state and thus meet the requirements of the pioneer's preference rules.

68. *Decision.* Our pioneer's preference rules require that an applicant "demonstrate that it (or its predecessor-in-interest) *has developed* the new service or technology; *e.g.*, that it (or its predecessor-in-interest) *has developed* the capabilities or possibilities of the technology or service or has brought them to a more advanced or effective state" (emphasis added).[24] A pioneer's preference is to reward work already accomplished. Further, the work must be developmental in nature. In contrast to Suite 12, which has performed substantial developmental work and experimental testing of its LMDS technology, UTPA has provided no substantive information about any work that it has performed with regard to LMDS or similar technology. While we concur with UTPA that using Suite 12's technology to serve educational needs in the Rio Grande Valley potentially would confer substantial educational benefits on residents of this area and therefore would be commendable, the purpose of the pioneer's preference rules is not to select licensees for a service, but to reward innovative technical development. If the rules proposed herein are adopted and service is authorized generally, selecting the

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[20] In its request for pioneer's preference filed on September 24, 1991, Suite 12 specified the San Francisco PMSA as its preferred preference area; however, in an amendment filed on November 19, 1991, Suite 12 changed its request to the Los Angeles PMSA, where it had received an experimental license.

[21] *See* Petition for Pioneer's Preference, May 1, 1992, at 2.

[22] *See* letter of June 18, 1992 from Thomas P. Stanley to Steven D. Copold, at 1-2.

[23] *See* Petition for Reconsideration, July 20, 1992, at 3.

[24] 47 C.F.R. § 1.402(a). *See Tentative Decision and Memorandum Opinion and Order*, GEN Docket No. 90-314, released November 6, 1992, paras. 37-49.

licensees to provide such service will be accomplished pursuant to the regular governing selection regulations, and UTPA would be eligible to apply in the normal manner. Accordingly, we treat UTPA's Petition for Reconsideration as a Petition for Review and affirm the dismissal of UTPA's pioneer's preference request.

VI. CONCLUSION

69. We tentatively conclude that the 28 GHz band should be redesignated to accommodate multipoint technology. We propose rules designed to foster the provision of innovative services for the public interest, convenience, and necessity. We invite public comment on the tentative conclusions addressed herein and on the rules set forth in Appendix B.

VII. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

70. The NPRM portion of this proceeding is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except "during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. §§1.1202, 1.1203, and 1.1206(a). Because it has been formally opposed, Suite 12's request for a pioneer's preference is a restricted proceeding, and *ex parte* presentations are prohibited. *See* 47 C.F.R. §1.1208. Similarly if University of Texas - Pan American's dismissed pioneer's preference request is opposed, it will also become a restricted proceeding. In addition, those waiver requests that are formally opposed or mutually exclusive are also restricted proceedings.

Initial Regulatory Flexibility Analysis

71. *Reason for action.* The purpose of this NPRM is to obtain comment on the change in the fixed service usage for the 28 GHz frequency band.

72. *Objectives.* The objective of this proposal is to consider licensing and service rules for the development and implementation of a new technology to provide video distribution and other telecommunications services to the public.

73. *Legal basis.* The authority for this action is the Administrative Procedure Act, 5 U.S.C. §553; and sections 4(i), 4(j), 301, 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. §§ 145, 301, and 303(r).

74. *Reporting, recordkeeping and other compliance requirements.* Reporting requirements are proposed to ensure that the spectrum, if redesignated for these new uses, is used to serve the public's need for communications services.

75. *Federal rules which overlap, duplicate or conflict with these rules.* None.

76. *Description, potential impact and number of small entities involved.* Any rule changes in this proceeding could affect MMDS licensees, the majority of which are small businesses. These entities may have some additional competition from video programming service which could be provided by Suite 12's multicell technology. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

77. *Significant Alternatives.* There are no presently available alternatives to the technology proposed by Suite 12.

Comment Dates

78. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **March 16, 1993,** and reply comments on or before **April 15, 1993.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

79. For further information, contact Ms. Susan Magnotti, at (202) 634-1773, Domestic Facilities Division, Common Carrier Bureau.

ORDERING CLAUSES

80. Accordingly, IT IS ORDERED That the Notice of Proposed Rulemaking is hereby adopted with proposed rules in Appendix B;

81. IT IS FURTHER ORDERED That the petition for reconsideration filed by University of Texas - Pan American IS DENIED;

82. IT IS FURTHER ORDERED That the 971 pending applications in the Point-to-Point Microwave Radio Service involving waiver requests listed in Appendix C ARE DENIED;

83. IT IS FURTHER ORDERED That Suite 12 Group is tentatively granted a pioneer's preference in accordance with the discussion in paragraphs 63-65 of this document;

84. IT IS FURTHER ORDERED That the Secretary shall mail a copy of this document to the Chief Counsel for Advocacy, Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Petitioners for Rulemaking
Suite 12 Group
Video/Phone Systems, Inc.
Harris Corporation (Farinon Division)

Commenters to Suite 12 Group's Petition

Video/Phone Systems, Inc.
Harris Corporation (Farinon Division)
Wireless Cable Association, Inc.
Cross Country Wireless Cable I, L.P.
William B. Packer, Jr. (Packer Investments, Inc.)
Priscilla Marston
Dan Reiss, Esquire
Drake Darrin (Darrin Development Group)
William T. Lundberg (Alliance Associates)
Richard C. Woodbridge, Esquire
Robert G. Shepherd, Esquire
Charles S. Brand, President, Trontech Incorporated
Andrew Wahl (Markitstar)
Tom Brossard
David Jan Mitchell, Managing Partner, C/V Miami

Commenters to Harris Corporation's Petition
Peninsula Engineering Group, Inc.
Suite 12 Group
Digital Microwave Corporation
TeleSciences, Inc.
Motorola Microwave
American Petroleum Institute
Calling Communications Corporation

APPENDIX B

Proposed Rule Amendments

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 1 - Practice and Procedure

1. Subpart E -- Complaints, Applications, Tariffs, and Reports Involving Common Carriers is proposed to be amended as follows:

1.821 Scope

Add subparagraph (e):
(e) Local Multipoint Distribution Service.

A new Section 1.826 is proposed to be added as follows:

1.826 Random selection procedures for Local Multipoint Distribution Service.

(a) If there are mutually exclusive applications for an initial conditional license for a Local Multipoint Distribution Service license, the Commission may use the random selection process to select the conditional licensee. Each such random selection shall be conducted under the direction of the Chief of the Common Carrier Bureau. The designated Lottery Official shall select the winning applicant from among mutually exclusive applicants. Only one applicant shall be selected in each frequency block in a given market area. Following the random selection, the Commission shall announce the tentative selectee and determine whether the applicant is qualified to receive the conditional license. If the Commission determines that the tentative selectee is qualified to receive the conditional license, it shall grant the application. In the event that the tentative selectee's application is denied, another random selection procedure will be conducted.

(b) Competing applications for permits and licenses shall be designated for random selection in accordance with the procedures set forth at Sections 1.1621, 1.1622 (a), (b), (c) and (d), and 1.1623. No preferences pursuant to Sections 1.1622 (b)(2) or (b)(3) shall be granted to any LMDS applicant whose owners, when aggregated, have an ownership interest of more than fifty percent in a media of mass communications whose service areas, as set forth at Section 1.1622(e)(1) through (7), overlaps to any degree or is overlapped to any degree by the market area for which the conditional license is sought.

(c) Petitions to Deny may be filed only against the tentative selectee. These petitions must be filed within 45 days of the Public Notice announcing such tentative selection. A consolidated reply may be filed within 30 days of the due date for Petitions to Deny. Part 21 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 21 - Domestic Public Fixed Radio Services

1. Subpart I -- Point-to-Point Microwave Radio Service is proposed to be amended as follows:

21.701 Frequencies

Delete from table in subparagraph (a) the reference to 27,500--29,500 MHz and note 5.

21.703 Bandwidth and emission limitations.

Delete from table in subparagraph (a) the reference to 27,500--29,500 MHz.

2. A new Subpart L is proposed to be added as follows:

21.1000 Scope of Subpart

The rules in this subpart govern the licensing and operation of stations and systems in the Local Multipoint Distribution Service (LMDS). The licensing and operation of these stations and systems are also subject to rules elsewhere in this part that apply generally to Domestic Public Fixed Radio Services. However, in case of conflict, the rules in this subpart govern.

21.1001 Eligibility

(a) Local Multipoint Distribution Service authorizations will be issued on either a common carrier or a non-common carrier basis, as requested by the applicant. Applications will be granted only where the applicant establishes:

(1) it is legally, financially, technically, and otherwise qualified to render the services proposed;

(2) the public interest, convenience and necessity would be served by such a grant; and

(3) there are frequencies available to render the full range of services proposed in the application.

(b) Any applicant in the LMDS proposing to provide a medium of mass communication and desiring a preference in the random selection process, shall so indicate as part of its application.

21.1002 Frequencies

(a) Frequencies in the band 27.5 - 29.5 GHz are available for LMDS. Within each service area (see § 21.1007) there are two frequency allocations which the Commission may license: A-Band (27.5 - 28.5 GHz) and B-Band (28.5 - 29.5 GHz). Although the spectrum allocated to each licensee is initially divided into 20 MHz channels, licensees may subdivide their assignments into channels of any bandwidth within either band subject to obtaining coordinations as described in paragraph (b). In the event harmful interference occurs or appears likely to occur between two or more LMDS systems and such interference cannot be resolved between the parties, the Commission may require the licensees to make such changes in operations or techniques or equipment as it may deem necessary to avoid such interference.

(b) *Frequency coordination.* (1) All licensees in the Local Multipoint Distribution Service shall coordinate proposed frequency usage with existing users in service areas within 75 miles of all base stations affected, and with tentative selectees and other non-mutually exclusive pending applicants whose facilities could affect or be affected by the new proposal in terms of intersystem frequency interference or restricted ultimate system capacity, including shared satellite services operating on the 28.5 - 29.5 GHz band. This coordination requirement shall also apply to permissive changes (i.e. changes in frequency assignment not requiring prior Commission approval) within an authorized service area.

(2) All licensees shall cooperate fully and make reasonable efforts to resolve technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum; however, the party being coordinated with is not obligated to suggest changes or reengineer a proposal in cases involving conflicts. All licensees shall make every reasonable effort to avoid blocking the growth of other systems that are likely to need additional capacity in the foreseeable future.

(3) Where technical problems are resolved by an agreement or operating arrangement between the parties that would require special procedures to be taken to reduce the likelihood of inter-system interference or would result in a reduction of quality or capacity of either system, the new licensee shall notify the Commission. Upon making a permissive change, a licensee shall notify the Commission of its frequency usage and report on its coordination as required under this subsection.

21.1003 Status election

(a) Applicants and licensees may choose to elect either common carrier or non-common carrier status on a channel-by-channel basis and on an individual cell basis.

(b) Applicants and licensees must notify the Commission of their status elections and must identify the channels and/or individual cells which are operated on a non-common carrier basis. Areas and channels not on record as being in a non-common carrier status will be presumed to be in common carrier status. Licensees must maintain an accurate record of their status elections with the Commission. Changes in status must be reported within 10 days of the effective date of the change.

(c) Applicants shall provide a statement in their applications indicating their choices with regard to status.

(d) Licensees in the LMDS shall follow the procedures set out in §21.910 for change of status election.

21.1004 Content and Form of Applications

(a) Applications for new LMDS systems, and applications for modification of an LMDS conditional license, must comply with the specifications in this section. Failure by an applicant to comply with any requirement of this section will result in the application being dismissed as defective.

(b) *Forms, pages, and exhibits.* Forms, pages and exhibits must be prepared exactly as described and assembled in the order listed in this section.

(1) *Application cover.* The paper original of each application (other than the full-size map) must be enclosed in a stiff cover fastened securely along the left edge. The fastening assembly may not have exposed sharp edges.

(2) *Transmittal sheet.* The first page after the front cover of the application must be the transmittal sheet.

(i) Copies of the transmittal sheet may be obtained by contacting the Consumer Assistance Office, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554

(ii) On the transmittal sheet, the following information is required: the full name of the applicant, the frequency band, and the service area identification'name for which the applicant is applying. This information on the transmittal sheet must match exactly the information on the cover of the application.

(iii)) The transmittal sheet also contains a certification. The certification must be notarized and signed with the applicant's full name. Applicants must certify to the following:

"I hereby certify that this application for an authorization in the Local Multipoint Distribution Service is complete in every respect and contains all of the information required by FCC Form 494 and the Federal Communications Commission's rules governing this service.

"I acknowledge that, if the Commission finds this application to be incomplete and/or not in compliance with its Rules, or finds the certification is incorrect, the Commission will dismiss this application without further consideration.

"I certify that I am the real-party-in-interest in this application and there are no agreements or understandings other than those, if any, disclosed in this application, which provide that someone other than the applicant has a direct, indirect, future, or financial interest in the application and/or the requested conditional license. I also certify that the applicant intends to construct and operate the station as proposed and that there are no agreements or understandings inconsistent with this intent.

"I declare, under penalty of perjury, that I am the authorized representative of the above-named applicant in the matter of this application, that I have read and understood the foregoing certification, and that the matter and things therein stated are true and correct."

(iv) The certification must be signed and dated in accordance with the requirements of § 1.743 of this chapter. The certification must be signed in reproducible blue or black ink. Mechanical reproductions of the signature must not be used. The name of and position held by the person signing must be typed or clearly and legibly printed beneath the signature.

(3) *Table of Contents.* A table of contents must be provided. The table of contents must list all of the exhibits to the application.

(4) *FCC Form 494.* All information required for LMDS applications on form 494 must be provided.

(5) *Exhibits.* The following exhibits must be set off by tabs and numbered as follows:

(i) Exhibit I: Full-size Map. The scale of the full-size map must be 1:25 0,000. The map must show clearly on its face a legend, a distance scale and correctly labelled latitude and longitude lines. The entire map must be clear and legible. The map must show the entire Geographic Service Area and the boundaries of the Basic Trading Area. The map must be folded into a 8 1/2" x 11" plastic pocket that opens at the top or right side, and the pocket must be bound along the left side with the other pages of the application.

(ii) Exhibit II: Reduced Map. This map must be a proportional reduction to 8 1/2 x 11 inches, of the full-size maps required for Exhibit I.

(iii) Exhibit III: Ownership Information. Disclose plans for any arrangements for another entity to manage and/or operate the proposed system and provide the written agreements, if any.

(iv) Exhibit IV: Service Proposal. Provide information on how the applicant intends to ascertain and provide service to the public.

(v) Exhibit V: System Design. Engineering and methodology to construct system to carry out service proposal.

(vi) Exhibit VI: Public Interest Statement.

(vii) Exhibit VII: Environmental Impact Statement.

(viii) Exhibit VIII: Business Plan and Start-up Expenses. This exhibit must disclose in detail the projected cost of construction, and other initial expenses of the proposed system, how the applicant intends to go forward with its service proposal and system construction, and how the applicant intends to meet these expenses and cost of operations for the first year after the entire system is constructed.

(ix) Exhibit IX: Demonstration of Firm Financial Commitment.

21.1005 Areas available for licensing

LMDS applications will be accepted for each of the 487 Basic Trading Areas (BTAs) identified in the Rand McNally *1992 Commercial Atlas and Marketing Guide*, pp. 38 - 39, plus Alaska and Puerto Rico, for a total 489 Basic Trading Areas (BTAs).

21.1006 Application filing period

Applications for an LMDS authorization will not be accepted for any area except upon day(s) specifically identified for acceptance of such applications, as may be announced from time to time by the Commission.

21.1007 Geographic Service Areas

(a) The Geographic Service Area (GSA) of the LMDS system shall be defined by the applicant as the area the applicant intends to serve.

(b)No GSA may extend beyond the boundaries of the Basic Trading Area for which the applicant is applying. Any application which shows a GSA extending past the BTA boundary will be dismissed as defective.

(c) (i) The boundaries of the GSA must include 90% of the population of the BTA.

(c) (ii) The GSA must be drawn on one or more U.S. Geological survey map(s) with a scale of 1:25 0,000. The full-size map and a copy of the map reduced to an 8 1/2" x 11" sheet of paper must be included with the application.

(c) (iii) The applicant must provide the population of the BTA and provide the calculations showing the percentage of the population it proposes to serve.

21.1008 Settlements

(a) Applicants in the LMDS must file independent, individual applications.

(b) Notwithstanding Sections 21.11, 21.23, 21.29, 21.31, 21.38, 21.39, or any other section of this Part, the sale, transfer, assignment or other alienation of any interest in any pending LMDS application is prohibited. This restriction on transfers of interests in LMDS applications includes any form of alienation including option arrangements and agreements, as well as equity and debt placement plans, with the exception of the following:

(i) involuntary transfers if Sections 21.38(d) and (e) are complied with; and

(ii) *pro forma* transfers not involving a change in ownership interest.

21.1009 Mutually-exclusive LMDS applications

Notwithstanding the provisions of subsections 21.31(b)(2)(i) and (ii), to be entitled to be included in a random selection process with one or more conflicting applications, an application for a LMDS authorization must be received by the Commission in a condition acceptable for filing on the calendar day established by the Commission as the day LMDS applications may be filed for the particular BTA for which the application is filed.

21.1010 Interests in LMDS applications

(a) *Interests in applications filed by other than publicly-traded corporations.* Except as otherwise provided herein, no party shall have any interest, direct or indirect, in more than one application for any LMDS authorization.

(b) *Interests in publicly-traded corporate applications.* No applicant for an LMDS authorization may have an interest, direct or indirect, in any LMDS applications filed by publicly-traded corporations, except that ownership interests of less than one percent will not be considered.

21.1011 Demonstration of financial qualifications

(a) Applicants for an LMDS authorization shall demonstrate a firm financial commitment for the financing necessary to construct its entire proposed system over a period of three years and to operate the system for one year without revenue.

(b) Applicants must provide a business plan and the realistic and prudent estimated costs of proposed construction and other initial expenses; estimated operating expenses for a period of one year after completion of all construction; and for applicants not subject to subparagraph (d) of this section, a balance sheet current within 30 days of the date of the filing of the application.

(c) The firm financial commitment shall be from a recognized bank or other financial institution and shall evidence the lender's determination that it has assessed the creditworthiness of the loan applicant and that it is committed to providing the necessary financing. The commitment shall state any actions required of the applicant to continue the commitment in force. Applicants obtaining financing from other than a recognized lending institution must submit proof that the financing entity has such funds available and uncommitted to another LMDS application.

(d) Applicants relying on internal financing must provide the following information, current within 90 days of the date of the application, in accordance with generally accepted accounting principles:

(i) A balance sheet current within 90 days of the date of the application and copies of any financial commitments (for example, loan agreements and service contracts) in support of the proposed facilities; and

(ii) Whenever internal financing does not show adequate funds available and committed to meet the reasonable and prudent estimated costs of proposed construction and estimated operating expenses for one year, the applicant shall submit such additional information as is necessary to demonstrate financial ability, such as a current income statement and (from sources other than the proposed LMDS license) a statement of projected revenues and expenses.

(iii) The details of any loan or other form of credit arrangement intended to be utilized to finance the proposed construction, acquisition, or operation of the requested facilities including such information as the identity of the creditor(s), letters of commitment, terms of the transaction, and a statement that paragraph (e) of this section is complied with, and the details of any sale or placement of any equity or other form of ownership interest.

(e) *Notice upon default.* In addition to the disclosures required by paragraph (d) of this section, any loan or other credit arrangement providing for a chattel mortgage or secured interest in proposed LMDS facility must include a provision for a minimum of ten (10) days prior written notification to the licensee, and to the Commission, before any such equipment may be repossessed under default provision of the agreement.

21.1012 Spectrum utilization

All applicants for LMDS must submit as part of the application a detailed plan indicating how the bandwidth requested will be utilized. In particular the application must contain detailed descriptions of the cellular configuration with polarization diversity, the modulation method, the channel time sharing method, any error detecting and/or correcting codes, any spatial frequency reuse system and the total data throughput capacity in each of the links in the system. Further, the application must include a separate analysis of the spectral efficiency including both information bits per unit bandwidth and the total bits per unit bandwidth.

21.1013 Repeaters

The licensee of an LMDS system may install repeaters within its GSA, provided that the power flux density of the signal at any given point along the boundary of the BTA emanating from the repeater is no greater than the predicted power flux density from any LMDS transmitter in the BTA at such point.

21.1014 Conditions of licenses

(a)Each licensee initially will receive a five-year license conditioned upon constructing its authorized system within three years of the date of grant. (Other conditions may also apply to individual licensees as determined by the Commission on a case-by-case basis.) The conditional license will authorize exclusive use of either the A-Band or the B-Band within the borders of one BTA, notwithstanding the area covered by the licensee's proposed Geographic Service Area. The following notifications are required:

(i) When all or part of the proposed LMDS system is ready to be placed into operation, the conditional licensee must file a Form 494A, Notification of Completion of Construction, and the relevant fee.

(ii) Licensees must file a letter notification on or before the three-year anniversary date of the grant of the conditional license certifying that the facilities as authorized have been completed and that the entire system as approved is now operational and ready to provide service to the public, and will remain operational during the license period, unless the license is submitted for cancellation.

(b) No extensions of time to construct will be authorized for any reason, including but not limited to:

(i) loss of site availability; and

(ii) any pending application for modification of the authorization.

(c) The provisions of Section 21.44 of this part apply in cases of forfeiture and termination of LMDS station authorizations.

21.1015 Assignment, transfer, or alienation of interest in LMDS authorizations

Notwithstanding any other section of this Part, the sale, transfer, assignment or other alienation of any interest in any LMDS conditional license is prohibited prior to completion of all construction authorized by the conditional grant. This restriction on transfers of interests in LMDS conditional licenses includes any form of alienation including option arrangements and agreements, as well as equity and debt placement plans, with the exception of the following:

(a) involuntary transfers if Sections 21.38(d) and (e) are complied with;

(b) *pro forma* transfers involving no change in ownership interest or control of the license.

21.1016 License modification

Licensees finding it necessary to change any aspect of their proposal as authorized in the conditional license must file an application to modify their authorization, but this will not relieve the licensee from its obligation to proceed with its construction schedule under the terms of its conditional license.

21.1017 License renewal

LMDS licensees must apply for renewal of their licenses no more than 90 (ninety) and no fewer than 30 (thirty) days before the expiration date of the license. Licensees should comply with the provisions of Section 21.11(c) to renew their licenses.

FILE NUMBER	APPLICANT		FILE DATE	ACTION DATE	PN DATE		CALL SIGN	FEE NUMBER	SERVICE AREA	
9318609	CELULARVISION	P	LA 10/02/1993			T		8680009001		
9210970	EDELSON, HARRY	P	AL 01/24/1992		03/25/1992	T		8155255003	BIRMINGHAM	AL
9211077	GHZ BROADCASTING INC	P	AL 02/20/1992		05/06/1992	T		8155456015	BIRMINGHAM	AL
9211717	KRZETTOWSKI, ANDREW	P	AL 05/26/1992			T		8155019	BIRMINGHAM	AL
9215934	ROBERT ROSENKRANZ	P	AL 02/13/1992		05/20/1992	T		8155405003	BIRMINGHAM MSA	AL
9218184	CENTENNIAL BROADCASTERS	P	GA 07/20/1992			T		8155172006	COLUMBUS MSA	AL
9211450	FORESIGHT COMMUNICATIONS	P	AL 04/20/1992		06/24/1992	T		8155901010	HUNTSVILLE	AL
9218224	TOMPKINS, W. WOODRUFF	P	AL 08/24/1992			T		8155284006	HUNTSVILLE	AL
9218194	KINGSWOOD ASSOCIATES	P	AL 08/05/1992			T		8155224002	MOBILE	AL
9218176	FREDERICK M. PEYSER, JR.	P	AL 07/06/1992			T		8155142008	MOBILE MSA	AL
9218116	CHARLES D. SNELLING	P	AL 07/06/1992			T		8155142003	MONTGOMERY	AL
9318631	BSV PARTNERSHIP	P	AL 10/06/1992			T		8680020009	PENSACOLA PMSA	AL
9211453	FORESIGHT COMMUNICATIONS	P	AR 04/20/1992		06/24/1992	T		8155901007	LITTLE ROCK	AR
9216670	SENVISTA GENERAL	P	AR 04/08/1992		08/05/1992	T		8155856003	LITTLE ROCK	AR
9218100	SANFORD R. ROBERTSON	P	AR 06/12/1992			T		8155075011	LITTLE ROCK	AR
9218223	MCKISSOCK, WILLIAM J.	P	AR 08/24/1992			T		8155284008	LITTLE ROCK	AR
9318601	BSV PARTNERSHIP	P	AR 10/07/1992			T		8680027002	PINE BLUFF PMSA	AR
9112772	CELLULARVISION	P	AZ 07/15/1991		08/21/1991	TE		8155260008	PHOENIS	AZ
9111272	LDH INTERNATIONAL INC	P	AZ 02/08/1991		05/15/1991	TE		8155674010	PHOENIX	AZ
9218163	ALDA MULTICHANNELS, LTD.	P	AZ 06/17/1992			T		8155088007	PHOENIX	AZ
9218003	STEVEN P. SEITER	P	AZ 03/30/1992			T		8155755002	PHOENIX MSA	AZ
9200463	ALDA MULTICHANNELS	P	AZ 04/13/1992			T		8155881014	TUCSON	AZ
9200592	BSV PARTNERSHIP	P	AZ 04/13/1992			T		8155878001	TUCSON	AZ
9200601	PAUL S. BACHOW	P	AZ 04/14/1992			T		8155888002	TUCSON	AZ
9200650	ASSOCIATED MDS	P	AZ 04/14/1992		07/29/1992	T		8155886002	TUCSON	AZ
9210708	STEVAN A. BIRNBAUM	P	AZ 12/30/1991		02/12/1992	TE		8155037002	TUCSON	AZ
9211426	ASSOCIATED MDS	P	AZ 04/13/1992			T		8155588200	TUCSON	AZ
9216590	SENVISTA GENERAL	P	AZ 03/06/1992		08/05/1992	T		8155757006	TUCSON	AZ
9216659	ORANGE WIRELESS	P	AZ 04/13/1992		08/05/1992	T		8155881004	TUCSON	AZ
9216662	M.M. & C.O. VICK PARTNER	P	AZ 04/14/1992		08/05/1992	T		8155887001	TUCSON	AZ
9215624	ROBERT E. LA BLANC	P	AZ 01/24/1992		03/18/1992	T		8155255005	TUCSON MSA	AZ
9215624	ROBERT E. LA BLANC	P	AZ 01/24/1992		03/18/1992	T		8155255005	TUCSON MSA	AZ
9211476	PERRY W. HADDON	P	AZ 04/23/1992		07/08/1992	T		8155912001	YAVAPAI CO	AZ
9215894	SENVISTA GENERAL	P	AZ 02/26/1992		05/13/1992	T		8155481003	YUMA	AZ
9218159	BSV PARTNERSHIP	P	AZ 06/16/1992			T		8155080006	YUMA	AZ
9110802	LDH INTERNATIONAL INC	P	CA 02/19/1991		05/15/1991	TE		8155588003		CA
9211073	KINGSWOOD ASSOCIATES	P	CA 02/20/1992		05/06/1992	T		8155456001	ANAHEIM	CA
9215868	DR. KIM SLOAN	P	CA 02/11/1992		05/13/1992	S		8155386007	ANAHEIM	CA
9215868	DR. KIM SLOAN	P	CA 02/11/1992		05/13/1992	S		8155386008	ANAHEIM	CA
9210764	STEVAN A. BIRNBAUM	P	CA 01/02/1992		02/12/1992	TE		8155116010	BAKERSFIELD	CA
9215866	SMITH, KATHLEEN	P	CA 02/11/1992		05/13/1992	S		8155386009	BAKERSFIELD	CA
9215866	SMITH, KATHLEEN	P	CA 02/11/1992		05/13/1992	S		8155386009	BAKERSFIELD	CA
9211344	FRIEND, JOHNATHAN E.	P	CA 04/06/1992		06/17/1992	T		8155808005	CHICO	CA
9211355	JOHN C. CANIGLIA	P	CA 04/06/1992		06/24/1992	T		8155816002	CHICO	CA
9215432	WIRELESS CABLE LTD	P	CA 12/09/1991		02/05/1992	S			CHICO	CA
9218021	PACIFIC COMM. ASSOC.,INC	P	CA 04/28/1992			T		8155927006	CHICO	CA
9218013	CABLE SYSTEMS, LTD	P	CA 04/28/1992			T		8155927003	CONTRA COSTA CTY.	CA
9218019	PONDEROSA CABLE SYSTEMS	P	CA 04/28/1992			T		8155927002	CONTRA COSTA CTY.	CA
9218020	PONDEROSA CABLE SYSTEMS	P	CA 04/28/1992			T		8155927001	CONTRA COSTA CTY.	CA
9118155	EVANSTON TRANSMISSION CO	P	CA 08/22/1991		10/09/1991	TE		8155456003	CORONA	CA
9218060	TANIS WIRELESS ENTERPRIS	P	CA 05/18/1992			T		8155993001	FAIRFIELD/NAPA MSA	CA
9210699	BAY BROADCASTING ASSOC	P	CA 12/24/1991		02/12/1992	TE		8155998004	FREMONT	CA
9210969	JORGENSEN, DAVID G.	P	CA 01/24/1992		03/25/1992	T		8155255001	FRESNO	CA
9215540	LEILA L. MAHURIN	P	CA 01/15/1992		02/05/1992	S			FRESNO	CA
9218234	MAHURIN, LEILA L.	P	CA 08/28/1992			T			FRESNO	CA
9200215	BIRNBAUM A STEVAN	P	CA 01/24/1992		04/08/1992	T		8155307006	FRESNO, CA MSA	CA

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9210734	CITY OF GUSTINE	P	CA 12/31/1991		02/12/1992	TE		8155068007	GUSTINE	CA
9210733	CITY OF GUSTINE	P	CA 12/31/1991		02/12/1992	TE		8155068005	HATCH	CA
9210733	CITY OF GUSTINE	P	CA 01/03/1992		02/12/1992	TE		8155068005	HATCH	CA
9112775	CELLULARVISION	P	CA 07/15/1991		08/21/1991	TE		8155260009	LOS ANGELES	CA
9218191	PREFERRED WIRELESS COMM	P	TX 08/03/1992			T		8155219002	LOS ANGELES	CA
9218279	CT COMM. CORP.	P	CA 09/29/1992			T		8155403005	MODESTO MSA	CA
9218059	TANIS WIRELESS ENTERPRIS	P	CA 05/18/1992			T		8155993007	MONTEREY MSA	CA
9210276	HOVNANIAN, NINA C.	P	CA 11/04/1991		11/27/1991	TE		8155778003	OAKLAND	CA
9216617	TELECOM/HADDOCK INVESTOR	P	CA 03/24/1992		08/05/1992	T		8155703002	OAKLAND	CA
9216627	TELECOM INVESTMENT CORP	P	CA 03/24/1992		08/05/1992	T		8155704013	OAKLAND	CA
9216589	PATRICIA B. MAILANI	P	CA 03/06/1992		08/05/1992	T		8155564010	OAKLAND PMSA	CA
9216597	P.M.J. SECURITIES INC	P	CA 03/16/1992		08/05/1992	C		8155705013	OAKLAND PMSA	CA
9318617	CELULARVISION	P	CA 10/16/1992			T		8680052005	OAKLAND PMSA	CA
9210916	STEVAN A. BIRNBAUM	P	CA 01/21/1992		02/19/1992	T		8155233002	OXNARD-VENTURA	CA
9210968	JORGENSEN, DAVID G.	P	CA 01/24/1992		03/25/1992	T		8155254008	OXNARD-VENTURA	CA
9211072	KINGSWOOD ASSOCIATES	P	CA 02/20/1992		05/06/1992	T		8155456002	OXNARD/VENTURA	CA
9218011	SUITE 12 GROUP	P	CA 04/17/1992			T		8155896003	OXNARD/VENTURA	CA
9218063	TANIS WIRELESS ENTERPRIS	P	CA 05/18/1992			T		8155993004	REDDING MSA	CA
9215348	SUITE 12 GROUP	P	FL 11/25/1991		01/15/1992	TE			RIVERSIDE	CA
9216620	TELECOM/HADDOCK INVESTOR	P	CA 03/24/1992		08/05/1992	T		8155703014	RIVERSIDE	CA
9216633	TELECOM INVESTMENT CORP	P	CA 03/16/1992		08/05/1992	T		8155704007	RIVERSIDE	CA
9215631	LEWIS W. SIEGEL	P	CA 01/24/1992		03/18/1992	T		8155254009	RIVERSIDE PMSA	CA
9118119	KRIKORIAN, MICHAEL	P	CA 08/16/1992		10/09/1991	TE		8155430009	SACRAMENTO	CA
9210596	ACOR, EVERETT T	P	CA 12/09/1991		01/15/1992	TE		8155940014	SACRAMENTO	CA
9200211	CAMBRIDGE MANAGEMENT	P	CA 01/24/1992		04/08/1992	T		8155254911	SACRAMENTO, CA MSA	CA
9218088	MEEKER, HERBERT S.	P	CA 06/08/1992			T		8155058001	SACREMENTO	CA
9218272	IVAN L. WOLFF	P	CA 09/30/1992			T		868001009	SALINAS SEASIDE MSA	CA
9218186	LINDA CHESTER	P	CA 07/06/1992			T		8155141007	SALINAS-SEASIDE	CA
9218080	ORANGE WIRELESS PARTN.	P	CA 05/19/1992			T		8155996011	SAN DIEGO	CA
9218129	S.E. CONE, JR.	P	CA 05/18/1992			T		8155997004	SAN DIEGO	CA
9218133	JOHN E. BRENNAN	P	CA 05/14/1992			T		8155983005	SAN DIEGO	CA
9218168	ALDA MULTICHANNELS, LTD.	P	CA 06/17/1992			T		8188088002	SAN DIEGO	CA
9218235	RPC VENTURES LTD	P	CA 09/05/1991			T			SAN DIEGO	CA
9215621	R&R TELECOMMUNICATION	P	CA 01/24/1992		03/18/1992	T		8155255013	SAN DIEGO MSA	CA
9215621	R&R TELECOMMUNICATION	P	CA 01/24/1992		03/18/1992	T		8155255013	SAN DIEGO MSA	CA
9215635	PRINCETON SCIENTIFIC	P	CA 01/24/1992		03/18/1992	T		8155255007	SAN DIEGO MSA	CA
9215997	STEVEN P. SEITER	P	CA 02/24/1992		06/10/1992	T		8155464001	SAN DIEGO MSA	CA
9318616	CELULARVISION	P	CA 10/16/1992			T		8680052006	SAN DIEGO PMSA	CA
9112774	CELLULARVISION	P	CA 07/15/1991		08/21/1991	TE		8155260010	SAN FRANCISCO	CA
9218022	PACIFIC COMM. ASSOC. INC	P	CA 04/28/1992			T		8155927005	SAN FRANCISCO	CA
9318523	METROCOM TELECASTING	P	CA 10/01/1992			T		8680006002	SAN FRANCISCO	CA
9211128	HORNBY, HAROLD	P	CA 03/06/1992		05/13/1992	T		8155564009	SAN JOSE	CA
9211188	LINDEMANN, FRAYDA B.	P	CA 03/16/1992		05/13/1992	T		8155611002	SAN JOSE	CA
9215322	WIRELESS CABLE LTD	P	CA 11/21/1992		01/15/1992	S			SAN JOSE	CA
9215349	SUITE 12 GROUP	P	FL 11/25/1991		01/15/1992	TE			SAN JOSE	CA
9218109	PMB PARNTERSHIP	P	CA 06/16/1992			T		8155082007	SAN JOSE	CA
9215620	R&R TELECOMMUNICATION	P	CA 01/24/1992		03/18/1992	T		8155306004	SAN JOSE PMSA	CA
9215620	R&R TELECOMMUNICATION	P	CA 01/24/1992		03/18/1992	T		8155306004	SAN JOSE PMSA	CA
9215849	JAMES L. MELCHER	P	CA 12/31/1992		05/06/1992	S		8155067006	SAN JOSE PMSA	CA
9318507	JACOBS, MICHAEL	P	CA 10/26/1992			T		8680079004	SAN LUIS OBISPO	CA
9218070	MAURICE & CHARLOTTE VICK	P	CA 05/18/1992			T		8155997010	SANDIEGO	CA
9218192	PREFERRED WIRELESS COMM	P	CA 08/03/1992			T		8155219003	SANTA ANA	CA
9211071	KINGSWOOD ASSOCIATES	P	CA 02/20/1992		05/06/1992	T		8155456004	SANTA BARBARA	CA
9218062	TANIS WIRELESS ENTERPRIS	P	CA 05/18/1992			T		8155993003	SANTA BARBARA	CA
9218083	SUITE 12 GROUP	P	CA 06/08/1992			T		8155055001	SANTA BARBARA	CA
9218154	ALTERNATIVE BROADCAST	P	CA 05/27/1992			T		8155025006	SANTA BARBARA	CA

FILE NUMBER	APPLICANT			FILE DATE	ACTION DATE	PN DATE		CALL SIGN	FEE NUMBER	SERVICE AREA	
9218229	DUNNE/SANTELL/SINGER	P	CA	08/26/1992			T		8155292003	SANTA BARBARA	CA
9218255	CT COMMUNICATIONS CORP	P	CA	09/29/1992			T		8155398006	SANTA BARBARA	CA
9218065	TANIS WIRELESS ENTERPRIS	P	CA	05/18/1992			T		8155992	SANTA CRUZ	CA
9218061	TANIS WIRELESS ENTERPRIS	P	CA	05/18/1992			T		8155993002	SANTA MARIA	CA
9211343	GILIO, ROBIN V.	P	CA	04/06/1992		06/17/1992	T		8155808006	SANTA ROSA	CA
9215438	MSGC	P	CA	12/09/1991		02/05/1992	S			SANTA ROSA	CA
9216678	PRISCILLA MARSTON	P	CA	04/06/1992		08/05/1992	T		8155815001	SANTA ROSA	CA
9218085	SUITE 12 GROUP	P	CA	06/08/1992			T		8155055003	SANTA ROSA	CA
9216637	TOTAL TV OF CALIFORNIA	P	CA	04/13/1992		08/05/1992	T		8155872001	SEVEN SPRINGS VALLEY	CA
9218023	PACIFIC COMMUNICATIONS	P	CA	04/28/1992			T		8155927004	SHASTA COUNTY	CA
9218058	TANIS WIRELESS ENTERPRIS	P	CA	05/18/1992			T		8155993006	SOLANO CNTY MSA	CA
9210595	KIM PARTNERSHIP	P	CA	12/09/1991		01/15/1992	TE		8155940015	STOCKTON	CA
9210960	JORGENSEN, DAVID G.	P	CA	01/13/1992		03/04/1992	T		8155178005	STOCKTON	CA
9210963	BUCHWALD, JOSEPH B.	P	CA	01/15/1992		03/04/1992	T		8155178007	STOCKTON	CA
9211416	HORNBY, HAROLD	P	CA	04/13/1992		06/24/1992	T		8155880002	STOCKTON	CA
9211417	GILIO, ROBIN V.	P	CA	04/13/1992		06/24/1992	T		8155880001	STOCKTON	CA
9218064	TANIS WIRELESS ENTERPRIS	P	CA	05/18/1992			T		8155992001	SUTTER/YUBA MSA	CA
9211442	HORNBY, HENRI R.	P	WA	04/20/1992		06/24/1992	T		8155902002	TACOMA	CA
9218057	TANIS WIRELESS ENTERPRIS	P	CA	05/18/1992			T		8155993005	TULARE MSA	CA
9218095	JEANNE P. ROBERTSON	P	CA	06/12/1992			T		8155075006	VALEJO-NAPA	CA
9210701	CARISSIMI GROUP	P	CA	12/23/1991		02/12/1992	TE		8155998006	VALLEJO	CA
9211129	HORNBY, HAROLD	P	CA	03/06/1992		05/13/1992	T		8155564009	VALLEJO/NAPA	CA
9218106	FRANKLIN B. PIERCE	P	CA	06/16/1992			T		8155082003	VALLEJO/NAPA	CA
9216636	TOTAL TV	P	CA	04/13/1992		08/05/1992	T		8155872002	VICTORVILLE-BARSTOW	CA
9218274	IVAN L. WOLFF	P	CA	10/02/1992			T		8680001008	VILA.TUL.PORVLE.MSA	CA
9212000	HASELTINE, MICHAEL	P	CO	08/10/1992		09/09/1992	T		8155236003	BOULDER	CO
9318518	LIKINS, PAUL	P	CO	10/21/1992			T		8680064003	BOULDER-LONGMONT	CO
9218273	IVAN L. WOLFF	P	CO	10/02/1992			T		868001010	COL. SPGS. MSA	CO
9216668	SENVISTA GENERAL	P	CO	04/08/1992		08/05/1992	T		8155856001	COLORADO SPRINGS	CO
9218174	CHARLES D. SNELLING	P	CO	06/06/1992			T		8155142005	COLORADO SPRINGS	CO
9318511	ROY, ERNEST	P	CO	10/15/1992			T		8680048004	COLORADO SPRINGS	CO
9117539	JERARD F. MAHER	P	CO	07/15/1991		09/25/1991	S			DENVER	CO
9218188	BRUNS, ROBERT W.	P	CO	08/10/1992			T		8155237005	PUEBLO	CO
9216023	WESTERN SIERRA	P	CO	02/18/1992		06/10/1992	T		8155441017	PUEBLO MSA	CO
9218259	CT COMMUNICATIONS CORP	P	CT	09/29/1992			T		8155404001	BRIDGEPORT-MILFORD	CT
9218270	IVAN L. WOLFF	P	CT	10/02/1992			T		868001006	BRIDGPRT/MLFORD PMSA	CT
9318503	MATHES, PHILIP H.	P	CT	10/02/1992			T		8680011007	DANBURY	CT
9318516	LIKINS, PAUL	P	CT	10/21/1992			T		8680064001	DANBURY	CT
9215153	BRUCE G. MCNEILL	P	CT	11/01/1991		12/11/1991	TE			HARTFORD	CT
9218046	ORANGE WIRELESS PARTNERS	P	CT	05/11/1992			T		8155962001	HARTFORD	CT
9218149	S.E. CONE, JR.	P	CT	05/11/1992			T		8155964004	HARTFORD	CT
9200214	CLARK, THOMAS FRANCIS	P	CT	01/24/1992		04/08/1992	T		8155306008	HARTFORD MSA	CT
9218300	JOS. D. CARNEY & ASSC.	P	CT	09/30/1992			T		8680003003	HARTFORF MSA	CT
9210589	G/H GARFINKLE TRUST	P	CT	12/03/1992		01/15/1992	TE		8155916009	NEW HAVEN	CT
9218119	PEYSER, FREDERICK M.	P	CT	07/06/1992			T		8155143003	NEW HAVEN	CT
9218298	JOS. D. CARNEY & ASSC.	P	CT	10/02/1992			T		8680003001	NEW HAVEN MSA	CT
9215139	BEVERLY MARSTON	P	CT	10/30/1991		12/11/1991	S			STAMFORD	CT
9218241	CHESTER, LINDA	P	CT	09/16/1992			T		8155359002	STAMFORD	CT
9218256	CT COMMUNICATIONS CORP	P	CT	09/29/1992			T		8155398007	STAMFORD	CT
9218233	SMITH, WILLIAM L.	P	CT	08/24/1992			T		8155287001	WATERBURY	CT
9112776	B SQUARED INC	P	DC	07/17/1991		08/21/1991	TE		8155263004	WASHINGTON	DC
9218303	JOS. D. CARNEY 7 ASSC.	P	DC	09/30/1992			T		8680003006	WASHINGTON DC MSA	DC
9215504	M3 ILLINOIS TELECOM CORP	P	PA	01/13/1992		02/05/1992	S			WILLMINGTON	DE
9200452	ASSOCIATED MDS CORPORATI	P	DE	04/06/1992		07/08/1992	T			WILMINGTON	DE
9200529	ASSOCIATED MDS CORP.	P	DE	04/06/1992		07/15/1992	T		8155808002	WILMINGTON	DE
9200555	BACHOW, PAUL S.	P	DE	04/06/1992		07/15/1992	T		8155817001	WILMINGTON	DE

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9200586	CONE, S.E., JR	P	DE 04/06/1992		07/05/1992	T		8155811003	WILMINGTON	DE
9211350	GOLDBERG, ROSALIE Y.	P	DE 04/06/1992		06/17/1992	T		8155818006	WILMINGTON	DE
9211418	KINGSWOOD ASSOCIATES	P	CT 04/13/1992		06/24/1992	T		8155880006	WILMINGTON	DE
9215499	RICHARD C. WOODBRIDGE	P	DE 01/07/1992		02/05/1992	S			WILMINGTON	DE
9218008	ORANGE WIRELESS PARTNERS	P	DE 04/06/1992			T		8155811008	WILMINGTON	DE
9211921	RICHARD C. WOODBRIDGE	P	DE 07/06/1992		08/05/1992	T		8155141006	WILMINGTON PMSA	DE
9318632	BSV PARTNERSHIP	P	DE 10/06/1992			T		8680020010	WILMINGTON PMSA	DE
9216594	SEAVIEW TELESYSTEMS	P	FL 03/16/1992		08/05/1992	T		8155705016		FL
9211830	HIGH BAND BROADCASTING	P	FL 06/18/1992		07/29/1992	T		8155091005	BRADENTON	FL
9218155	ALTERNATIVE BROADCAST	P	FL 05/27/1992			T		8155025007	BRADENTON MSA	FL
9218220	PEYSER, FREDERICK M.	P	FL 08/19/1992			T		8155278001	DAYTONA BEACH	FL
9318001	CT COMMUNICATIONS CORP	P	FL 10/27/1992			T		8155441001	DAYTONA BEACH	FL
9200261	ACOR, EVERETT T. JR.	P	FL 02/18/1992		04/15/1992	T		8155441009	DAYTONA MSA	FL
9218001	WJB-TV FT. PIERCE LIMITE	P	FL 03/06/1992			T		8155565007	FORT PIERCE	FL
9216607	P.M.J. SECURITIES INC	P	FL 03/16/1992		08/05/1992	C		8155705009	FT LAUDERDALE	FL
9216611	SEAVIEW TELESYSTEMS	P	FL 03/16/1992		08/05/1992	C		8155705017	FT LAUDERDALE	FL
9216638	TELECOM INVESTMENT CORP	P	FL 03/16/1992		08/05/1992	T		8155704004	FT LAUDERDALE	FL
9216648	TELECOM/HADDOCK INVESTOR	P	FL 03/24/1992		08/05/1992	T		8155703006	FT LAUDERDALE	FL
9215440	OCEAN PARTNERSHIP	P	FL 12/09/1991		02/05/1992	S			FT MEYERS MSA	FL
9211309	FRIEND, JOHNATHAN E.	P	FL 04/07/1992		06/03/1992	T		8155810002	FT MYERS	FL
9215498	S & W PRODUCTIVE	P	FL 01/07/1992		02/05/1992	S		8155146002	FT MYERS	FL
9216603	SAFECOM PARTNERSHIP	P	FL 03/16/1992		08/05/1992	C		8155705003	FT MYERS	FL
9216616	TELECOM/HADDOCK INVESTOR	P	FL 03/16/1992		08/05/1992	T		8155703003	FT MYERS	FL
9216632	TELECOM INVESTMENT CORP	P	FL 03/16/1992		08/05/1992	T		8155704008	FT MYERS	FL
9218169	BMW ASSOCIATES	P	FL 06/12/1992			T		8155076005	FT MYERS MSA	FL
9215506	M3 ILLINOIS TELECOM CORP	P	PA 01/13/1992		02/05/1992	S		8155177005	FT PIERCE	FL
9218025	MAH, INC.	P	FL 05/01/1992			T		8155939006	FT PIERCE	FL
9216683	MITCHELL & CO.	P	FL 04/06/1992		08/05/1992	T		8155813006	FT PIERCE MSA	FL
9215320	WIRELESS CABLE LTD	P	FL 11/25/1991		01/15/1992	S			FT. LAUDERDALE	FL
9215347	SUITE 12 GROUP	P	FL 11/25/1991		01/15/1992	TE		8155874003	FT. LAUDERDALE	FL
9318600	BSV PARTNERSHIP	P	FL 10/07/1992			T		8680027001	FT. LAUDERDALE	FL
9218033	SMITH, WILLIAM L.	P	FL 08/24/1992			T		8155287002	GAINSVILLE MSA	FL
9200530	ASSOCIATED MDS CORP	P	FL 04/06/1992		07/15/1992	T		8155811015	JACKSONVILLE	FL
9200546	JOHN E. BRENNAN	P	FL 04/06/1992		07/15/1992	T		8155818003	JACKSONVILLE	FL
9200553	PAUL S. BACHOW	P	FL 04/06/1992		07/15/1992	T		8155817003	JACKSONVILLE	FL
9200588	S.E. CONE, JR.	P	FL 04/06/1992		07/15/1992	T		8155811001	JACKSONVILLE	FL
9210962	CROWLEY, JEFFERY B.	P	FL 01/14/1992		03/04/1992	T		8155182001	JACKSONVILLE	FL
9210973	FEINBERG, JUDY	P	FL 01/24/1992		03/25/1992	T		8155305007	JACKSONVILLE	FL
9211311	LEVIN, MICHAEL H.	P	FL 04/06/1992		06/03/1992	T		8155810003	JACKSONVILLE	FL
9211348	LINDEMANN, FRAYDA B.	P	FL 04/06/1992		06/17/1992	T		8155818002	JACKSONVILLE	FL
9215442	NEW SOUTH ASSOCIATES	P	FL 12/05/1991		02/05/1992	TE			JACKSONVILLE	FL
9218006	ORANGE WIRELESS PARTNERS	P	FL 04/06/1992			T		8155811010	JACKSONVILLE	FL
9215811	SMITH, KATHLEEN	P	FL 02/10/1992		04/29/1992	T		8155370005	JACKSONVILLE MSA	FL
9216584	PATRICIA B. MAILANI	P	FL 03/06/1992		08/05/1992	T		8155564015	JACKSONVILLE MSA	FL
9215998	SUBSCRIBER TV PARTNERS	P	FL 02/20/1992		06/10/1992	T		8155464001	LAKELAND MSA	FL
9218208	MARX, ROBERT O.	P	FL 08/10/1992			T		8155237004	LAKELAND/WINTER HAVE	FL
9218282	CT COMM. CORP.	P	FL 09/29/1992			T		8155403008	LAKELND/WINT HVN MSA	FL
9215437	MELBOURNE ASSOCIATES	P	FL 12/09/1991		02/05/1992	S		8155940008	MELBOURNE	FL
9216609	SAFECOM PARTNERSHIP	P	FL 03/16/1992		08/05/1992	C		8155705007	MELBOURNE	FL
9216639	TELECOM INVESTMENT CORP	P	FL 03/16/1992		08/05/1992	T		8155704003	MELBOURNE	FL
9216647	TELECOM/HADDOCK INVESTOR	P	FL 03/16/1992		08/05/1992	T		8155703007	MELBOURNE	FL
9216680	ROBERT A. PAHNEUF	P	FL 04/06/1992		08/05/1992	T		8155815005	MELBOURNE	FL
9218000	LIMITED PARTNERSHIP	P	FL 03/06/1992			T		8155565006	MELBOURNE	FL
9218171	BMW ASSOCIATES	P	FL 06/12/1992			T		8155076003	MELBOURNE MSA	FL
9117535	MITCHELL & CO. LTD	P	FL 07/15/1991		09/25/1991	S		8155263001	MIAMI	FL
9200733	BACHOW, PAUL S.	P	FL 05/12/1992		08/05/1992	T		8155968002	MIAMI	FL

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9211604	FOUR M MLDS GROUP	P	FL 05/11/1992		07/08/1992	T		8155963002	MIAMI	FL
9215319	WIRELESS CABLE LTD	P	FL 11/25/1991		01/15/1992	S			MIAMI	FL
9218050	ORANGE WIRELESS PARTNERS	P	FL 05/11/1992			T		8155962005	MIAMI	FL
9218146	CONE, S.E., JR.	P	FL 05/11/1992			T		8155964007	MIAMI	FL
9218199	VICK, MAURICE M. & CHARL	P	FL 08/07/1992			T		8155234007	MIAMI	FL
9218289	JOS. D. CAREY ASSC.	P	FL 09/30/1992			T		8680002002	MIAMI MSA	FL
9200461	CACTUS TV INTERESTS	P	FL 04/13/1992		07/15/1992	T		8155880008	NAPLES MSA	FL
9218204	MATHES, PHILIP H.	P	FL 08/10/1992			T		8155237006	OCALA	FL
9216020	SUBSCRIBER TV PARTNERS	P	FL 02/20/1992		06/10/1992	T		8155456006	OCALA MSA	FL
9218209	MONTGOMERY, ROBERT L.	P	NY 08/10/1992			T		8155237003	ORANGE COUNTY	FL
9200466	CONE, S.E., JR.	P	FL 04/13/1992		07/15/1992	T		8155882010	ORLANDO	FL
9200603	PAUL S. BACHOW	P	FL 04/14/1992		07/15/1992	T		8155888004	ORLANDO	FL
9200633	ACOR, EVERETT T. JR.	P	FL 03/30/1992		07/22/1992	T		8155755003	ORLANDO	FL
9210763	FEINBERG, JUDY	P	NM 01/02/1992		02/12/1992	TE		8155116011	ORLANDO	FL
9210901	EDELSON, HARRY	P	FL 01/21/1992		02/19/1992	T		8155234007	ORLANDO	FL
9211429	FOUR M MLDS GROUP	P	FL 04/13/1992		06/24/1992	T		8155882005	ORLANDO	FL
9216661	ORANGE WIRELESS	P	FL 04/13/1992		08/05/1992	T		8155881002	ORLANDO	FL
9216667	M.M. & C.O. VICK PARTNER	P	FL 04/14/1992		08/05/1992	T		8155887002	ORLANDO	FL
9218010	SUITE 12 GROUP	P	FL 04/17/1992			T		8155896004	ORLANDO	FL
9218287	ASSC. MDS CORP.	P	FL 04/14/1992			T			ORLANDO	FL
9200459	CROWLEY, JEFFERY B.	P	FL 04/13/1992		07/08/1992	T		8155877004	ORLANDO MSA	FL
9215367	SHENANDOAH GROUP	P	NC 12/05/1991		01/29/1992	S		8155923002	PENSACOLA	FL
9216595	P.M.J. SECURITIES INC	P	FL 03/16/1992		08/05/1992	C		8155705015	PENSACOLA	FL
9216612	TELECOM/HADDOCK INVESTOR	P	FL 03/16/1992		08/05/1992	C		8155703009	PENSACOLA	FL
9216641	TELECOM INVESTMENT CORP	P	FL 03/16/1992		08/05/1992	T		8155704001	PENSACOLA	FL
9218281	CT COMM. CORP.	P	FL 09/29/1992			T		8155403007	PENSACOLA	FL
9215509	M3 ILLINOIS TELECOM CORP	P	PA 01/13/1992		02/05/1992	S		8155177014	SARASOTA	FL
9216608	P.M.J. SECURITIES INC	P	FL 03/16/1992		08/05/1992	C		8155705008	SARASOTA	FL
9216615	TELECOM/HADDOCK INVESTOR	P	FL 03/16/1992		08/05/1992	C		8155703004	SARASOTA	FL
9216630	TELECOM INVESTMENT CORP	P	FL 03/16/1992		08/05/1992	T		8155704010	SARASOTA	FL
9218038	MAH INC	P	FL 05/01/1992			T		8155939007	SARASOTA	FL
9218170	BMW ASSOCIATES	P	FL 06/12/1992			T		8155076004	SARASOTA	FL
9216682	MITCHELL & CO.	P	FL 04/06/1992		08/05/1992	T		8155813007	SARASOTA MSA	FL
9211373	LANDERS, HAROLD S. III	P	FL 04/06/1992		06/24/1992	T		8155815004	TALLAHASSE	FL
9215443	NEW SOUTH ASSOCIATES	P	FL 12/05/1991		02/05/1992	TE		8155923007	TALLAHASSE	FL
9118156	EVANSTON TRANSMISSION CO	P	FL 08/23/1991		10/09/1991	TE		8155456002	TAMPA	FL
9200739	BACHOW, PAUL S.	P	FL 05/15/1992		08/05/1992	T		8155991001	TAMPA	FL
9211691	FOUR M MLDS GROUP	P	FL 05/18/1992		07/15/1992	T		8155996001	TAMPA	FL
9218071	M.M. & C.O. VICK PARTNER	P	FL 05/18/1992			T		8155997011	TAMPA	FL
9218081	ORANGE WIRELESS PARTNERS	P	FL 05/18/1992			T		8155996009	TAMPA	FL
9218125	CONE, S.E., JR.	P	FL 05/18/1992			T		8155997008	TAMPA	FL
9218305	JOS.D. CARNEY & ASSC.	P	FL 09/30/1992			T		8680003008	TAMPA MSA	FL
9215630	MYERS, FREDERICK M.	P	FL 01/24/1992		03/18/1992	T		8155254005	TAMPA-ST PETE MSA	FL
9215630	MYERS, FREDERICK M.	P	FL 01/24/1992		03/18/1992	T		8155254005	TAMPA-ST PETE MSA	FL
9211620	ILOHCA CORP.	P	FL 05/14/1992		07/08/1992	T		8155982006	TAMPA/ST PETERSBURG	FL
9211831	HIGH BAND BROADCASTING	P	FL 06/18/1992		07/29/1992	T		8155091004	TAMPA/ST PETERSBURG	FL
9216672	PATRICIA B. MAILANI	P	FL 04/06/1992		08/05/1992	T		8155810006	TRUCKERS CORNER	FL
9210735	CORNBLATT, ARNOLD	P	FL 01/06/1992		02/12/1992	TE		8155123006	W PALM BEACH	FL
9216606	P.M.J. SECURITIES INC	P	FL 03/16/1992		08/05/1992	C		8155705010	W PALM BEACH	FL
9216619	TELECOM/HADDOCK INVESTOR	P	FL 03/16/1992		08/05/1992	T		8155703015	W PALM BEACH	FL
9216629	TELECOM INVESTMENT CORP	P	FL 03/16/1992		08/05/1992	T		8155704011	W PALM BEACH	FL
9215324	WIRELESS CABLE LTD	P	FL 11/21/1991		01/15/1992	S		8155860005	W. PALM BEACH	FL
9218140	CONE, S.E., JR.	P	FL 05/11/1992			T		8155964013	WEST PALM BCH	FL
9200662	BSV PARTNERSHIP	P	FL 06/16/1992		07/29/1992	T		8155082001	WEST PALM BEACH	FL
9210420	DARRIN, DRAKE	P	FL 11/04/1991		12/26/1991	TE		8155778004	WEST PALM BEACH	FL
9211131	HORNBY, HAROLD	P	FL 03/06/1992		05/13/1992	T		8155564006	WEST PALM BEACH	FL

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9211559	FOUR M MLDS GROUP	P	FL 05/11/1992		07/08/1992	T		8155963007	WEST PALM BEACH	FL
9218040	ORANGE WIRELESS PARTNERS	P	FL 05/11/1992			T		8155962015	WEST PALM BEACH	FL
9218201	M.M. & C.O. VIC PARTNERS	P	FL 08/07/1992			T		8155232001	WEST PALM BEACH	FL
9218185	CLASSIC BROADCASTING	P	GA 07/20/1992			T		8155172004	ATHENS MSA	GA
9218310	JOS. D. CARNEY & ASSOC.	P	GA 09/30/1992			T		8680004006	ATLANTA MSA	GA
9218177	PEYSER, FREDERICK M. JR	P	GA 07/06/1992			T		8155142007	AUGUSTA	GA
9218218	GLOBAL TELECOMMUNICATION	P	GA 08/10/1992			T		8155237002	AUGUSTA	GA
9318514	BUTLER, ELIOT	P	GA 10/15/1992			T		8680048006	AUGUSTA	GA
9112779	GLENAIRE INC	P	GA 07/17/1991		10/02/1991	TE		8155265010	CUMMING	GA
9218213	JACOBS, MICHAEL	P	GA 08/10/1992			T		8155236001	SAVANNAH	GA
9218017	UMDA TELECOM	P	GU 04/28/1992			T		8155926004	AGANA	GU
9218018	UMDA TELECOM	P	GU 04/28/1992			T		8155926008	GARAPAN	GU
9218015	UMDA TELECOM	P	GU 04/28/1992			T		8155926006	LUPOG	GU
9218236	WESTERN SYSTEMS INC	P	GU 08/31/1992			T		8155301005	MARIANAS ISLANDS	GU
9218237	WESTERN SYSTEMS INC	P	GU 08/31/1992			T		8155301004	MARIANAS ISLANDS	GU
9218238	TROPIC ISLES CABLE TV	P	GU 08/31/1992			T		8155301007	MARIANAS ISLANDS	GU
9218239	TROPIC ISLES CABLE TV	P	GU 08/31/1992			T		8155301006	MARIANAS ISLANDS	GU
9218014	UMDA TELECOM	P	GU 04/28/1992			T		8155926007	TAMUNING	GU
9218016	UMDA TELECOM	P	GU 04/29/1992			T		8155926005	TINIAN	GU
9218215	HUGHES, LEONARD	P	HI 08/10/1992			T		8155236005	HILO	HI
9200366	FAITH C. AMBY	P	HI 03/06/1992		05/06/1992	T		8155564003	HONOLULU	HI
9200745	PAUL S. BACHOW	P	HI 01/01/1993		08/05/1992	T			HONOLULU	HI
9210458	HOVNANIAN, PARIS H.	P	HI 11/27/1991		12/26/1991	TE		8155886002	HONOLULU	HI
9211678	FRAYDA B. LINDEMANN	P	HI 05/14/1992		07/15/1992	T		8155984003	HONOLULU	HI
9211685	FOUR M MLDS GROUP	P	HI 05/18/1992		07/15/1992	T		8155996007	HONOLULU	HI
9215439	OCEAN PARTNERSHIP	P	HI 12/09/1991		02/05/1992	S			HONOLULU	HI
9218069	ORANGE WIRELESS PARTNERS	P	HI 05/18/1992			T		8155996013	HONOLULU	HI
9218072	MAURICE & CHARLOTTE VICK	P	HI 05/18/1992			T		8155997012	HONOLULU	HI
9218128	CONE, S.E., JR.	P	HI 05/18/1992			T		8155997005	HONOLULU	HI
9218132	BRENNAN, JOHN E.	P	HI 05/14/1992			T		8155983006	HONOLULU	HI
9318625	CELULARVISION	P	HI 10/06/1992			T		8680020003	HONOLULU PMSA	HI
9215510	M3 ILLINOIS TELECOM CORP	P	PA 01/13/1992		02/05/1992	S		8155177013	DES MOINES	IA
9216622	TELECOM/HADDOCK INVESTOR	P	IA 03/16/1992		08/05/1992	T		8155703012	DES MOINES	IA
9216635	TELECOM INVESTMENT CORP	P	IA 03/16/1992		08/05/1992	T		8155704005	DES MOINES	IA
9216681	PRISCILLA MARSTON	P	IA 04/06/1992		08/05/1992	T		8155815007	DES MOINES	IA
9218260	CT COMMUNICATIONS CORP	P	IA 09/29/1992			T		8155404002	DES MOINES	IA
9216604	P.M.J. SECURITIES INC	P	IA 03/16/1992		08/05/1992	C		8155705002	DES MOINES MSA	IA
9218034	MAH INC	P	IA 05/01/1992			T		8155939011	DES MOINES MSA	IA
9318520	SKYLINE ENTRTNMNT NTWORK	P	ID 10/23/1992			T		8680075015	COEUR D'ALENE	ID
9218267	PAUL LIKINS	P	IL 09/30/1992			T		868001003	AURORA-ELGIN, IL PMS	IL
9216676	ROCHELLE SILVIA	P	IL 04/06/1992		08/05/1992	T		8155816007	AURORA/ELGIN	IL
9215503	M3 ILLINOIS TELECOM CORP	P	PA 01/13/1992		02/05/1992	S		8155177008	AURORA/ELGIN PMSA	IL
9218037	MAH INC	P	IL 05/04/1992			T		8155939010	AURORA/ELGIN PMSA	IL
9318521	SPECCHIO DEVELOPERS	P	IL 10/27/1992			T		8680087005	CHAMPAIGN	IL
9318522	EVANS MICROWAVE, INC.	P	IL 10/27/1992			T		8680087006	CHAMPAIGN	IL
9112773	CELLULARVISION	P	IL 07/15/1991		08/21/1991	TE		8155260007	CHICAGO	IL
9218093	PALLISADES BROADCASTING	P	IL 06/12/1992			T		8155075001	CHICAGO	IL
9218230	ALDA MULTICHANNELS LTD	P	IL 08/20/1992			T		8155281004	CHICAGO	IL
9218240	EVANS MICROWAVE, INC.	P	IL 09/10/1992			T		8155339001	CHICAGO	IL
9110797	LDH INTERNATIONAL INC	P	IL 02/19/1991		05/15/1991	TE		8155585003	CHICAGO MSA	IL
9218297	JOS. D. CARNEY & ASSC.	P	IL 09/30/1992			T		8680002010	CHICAGO MSA	IL
9218179	SPECCHIO DEVELOPERS, LTD	P	IL 07/16/1992			T		8155168002	CHICAGO PMSA	IL
9215507	M3 ILLINOIS TELECOM CORP	P	PA 01/13/1992		02/05/1992	S		8155177004	DAVENPORT-MOLINE ISL	IL
9211376	DAMADIAN, ARAM	P	IL 04/06/1992		06/24/1992	T		8155813004	DAVENPORT-MOLINE-	IL
9218030	MAH INC	P	IL 05/01/1992			T		8155939015	DAVENPORT/ROCK ISLAN	IL
9112268	EVANSTON TRANSMISSION CO	P	IL 06/07/1991		06/26/1991	TE		8155092008	DUPAGE/COOK CTY PMSA	IL

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9200664	BSV PARTNERSHIP	P	IL 06/16/1992		07/29/1992	T		8155082009	JOLIET PMSA	IL
9211182	GHZ BROADCASTING INC	P	IL 03/16/1992		05/13/1992	T		8155609006	JOLIET PMSA	IL
9218265	PAUL LIKINS	P	IL 09/30/1992			T		868001001	JOLIET, IL PMSA	IL
9200549	BSV PARTNERSHIP	P	IL 04/06/1992		07/15/1992	T		8155813001	LAKE COUNTY PMSA	IL
9215505	M3 ILLINOIS TELECOM CORP	P	PA 01/13/1992		02/05/1992	S		8155177006	LAKE COUNTY PMSA	IL
9218026	MAH INC	P	IL 05/04/1992			T		8155939005	LAKE COUNTY PMSA	IL
9218101	SANFORD R. ROBERTSON	P	IL 06/12/1992			T		8155075009	LAKE COUNTY PMSA	IL
9211713	ILOHCA CORP.	P	IL 05/21/1992		07/15/1992	T		8155013008	PEORIA	IL
9211833	HIGH BAND BROADCASTING	P	IL 06/18/1992		07/29/1992	T		8155091001	PEORIA	IL
9216674	RONALD E. SANSAC	P	IL 04/06/1992		08/05/1992	T		8155816001	ROCKFORD	IL
9215513	M3 ILLINOIS TELECOM CORP	P	PA 01/13/1992		02/05/1992	S		8155177010	ROCKFORD MSA	IL
9218029	MAH INC	P	IL 05/04/1992			T		8155939014	ROCKFORD MSA	IL
9218228	SMITH, WILLIAM L.	P	IN 08/24/1992			T		8155287003	EVANSVILLE	IN
9218157	ALTERNATIVE BROADCAST	P	IN 05/27/1992			T		8155025009	FT WAYNE MSA	IN
9318269	PAUL LIKINS	P	IN 10/02/1992			T		868001005	GARY/HAMMOND PMSA	IN
9318276	CT COMM. CORP.	P	IN 10/02/1992			T		8155403002	GARY/HAMMOND PMSA	IN
9118339	JMJ ASSOCIATES	P	IN 09/11/1991		10/30/1991	TE		8155522001	INDIANAPOLIS	IN
9200468	ASSOCIATED MDS CORP.	P	IN 04/13/1992		07/15/1992	T		8155886006	INDIANAPOLIS	IN
9200596	BMB PARTNERSHIP	P	IN 04/13/1992		07/15/1992	T		8155878004	INDIANAPOLIS	IN
9200602	BACHOW, PAUL S.	P	IN 04/13/1992		07/15/1992	T		8155888001	INDIANAPOLIS	IN
9210709	CORNBLATT, ARNOLD	P	IN 12/26/1991		02/12/1992	TE		8155032001	INDIANAPOLIS	IN
9210716	HORNBY, HAROLD	P	IN 12/30/1991		02/12/1992	TE		8155043004	INDIANAPOLIS	IN
9210717	AMBY, FAITH C.	P	IN 12/30/1991		02/12/1992	TE		8155043003	INDIANAPOLIS	IN
9210718	LEVIN, MICHAEL H.	P	IN 12/30/1991		02/12/1992	TE		8155043002	INDIANAPOLIS	IN
9215419	PATRICIA MILANA	P	IN 12/30/1991		02/05/1992	TE			INDIANAPOLIS	IN
9216623	TELECOM/HADDOCK INVESTOR	P	IN 03/16/1992		08/05/1992	T		8155703011	INDIANAPOLIS	IN
9216660	ORANGE WIRELESS	P	IN 04/13/1992		08/05/1992	T		8155881003	INDIANAPOLIS	IN
9216664	M.M. & C.O. VICK PARTNER	P	IN 04/15/1992		08/05/1992	T		8155887004	INDIANAPOLIS	IN
9216599	P.M.J. SECURITIES INC	P	IN 03/16/1992		08/05/1992	C		8155705001	INDIANAPOLIS MSA	IN
9318311	JOS. D. CARNEY & ASSOC.	P	IN 10/02/1992			T		8680004007	INDIANAPOLIS MSA	IN
9200724	BACHOW, PAUL S.	P	KS 05/12/1992		08/05/1992	T		8155970002	WICHITA	KS
9211552	FOUR M MLDS GROUP	P	KS 05/11/1992		07/08/1992	T		8155963014	WICHITA	KS
9215444	NEW SOUTH ASSOCIATES	P	FL 12/05/1991		02/05/1992	TE			WICHITA	KS
9216679	PRISCILLA MARSTON	P	KS 04/06/1992		08/05/1992	T		8155815003	WICHITA	KS
9218052	ORANGE WIRELESS PARTNERS	P	KS 05/12/1992			T		8155962007	WICHITA	KS
9218089	HERBERT S. MEEKER	P	KS 06/09/1992			T		8155065002	WICHITA	KS
9218138	S.E. CONE, JR.	P	KS 05/14/1992			T		8155964015	WICHITA	KS
9218178	FREDERICK M. PEYSER	P	KY 06/06/1992			T		8155142006	LEXINGTON-FAYETTE	KY
9118157	EVANSTON TRANSMISSION CO	P	KY 08/23/1991		10/09/1991	TE		8155456001	LOUISVILLE	KY
9215430	WIRELESS CABLE LTD	P	KY 12/09/1991		02/05/1992	S			LOUISVILLE	KY
9216583	SENVISTA GENERAL	P	KY 03/13/1992		08/05/1992	T		8155601018	LOUISVILLE	KY
9215850	DIANE WECHSLER	P	KY 12/31/1991		05/06/1992	T		8155067005	LOUISVILLE MSA	KY
9218098	JEANNE P. ROBERTSON	P	LA 06/12/1992			T		8155075003	BATON ROUGE	LA
9200731	BACHOW, PAUL S.	P	LA 05/12/1992		08/05/1992	T		8155968006	BATON ROUGE	LA
9211550	FOUR M MLDS GROUP	P	LA 05/11/1992		07/08/1992	T		8155963016	BATON ROUGE	LA
9218054	ORANGE WIRELESS PARTNERS	P	LA 05/11/1992			T		8155962009	BATON ROUGE	LA
9218086	HERBERT S. MEEKER	P	LA 06/09/1992			T		8155065001	BATON ROUGE	LA
9218139	S.E. CONE, JR.	P	LA 05/14/1992			T		8155964014	BATON ROUGE	LA
9218207	VICK, MAURICE M & CHARLO	P	LA 08/07/1992			T		8155234006	BATON ROUGE	LA
9118154	EVANSTON TRANSMISSION CO	P	LA 08/22/1991		10/09/1991	TE		8155456004	NEW ORLEANS	LA
9215434	WIRELESS CABLE LTD	P	KY 12/09/1991		02/05/1992	S		8155940016	NEW ORLEANS	LA
9216598	P.M.J. SECURITIES INC	P	LA 03/16/1992		08/05/1992	C		8155705012	NEW ORLEANS	LA
9216624	TELECOM/HADDOCK INVESTOR	P	LA 03/24/1992		08/05/1992	T		8155703010	NEW ORLEANS	LA
9216626	TELECOM INVESTMENT CORP	P	LA 03/16/1992		08/05/1992	T		8155704014	NEW ORLEANS	LA
9111269	LDH INTERNATIONAL INC	P	MA 02/08/1991		05/15/1991	TE		8155674007		MA
9215321	WIRELESS CABLE LTD	P	MA 11/25/1991		01/15/1992	S		8155875008	BOSTON	MA

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9216610	SEAVIEW TELESYSTEMS	P	FL 03/16/1992		08/05/1992	C		8155705018	BOSTON	MA
9218166	ALDA MULTICHANNELS, LTD.	P	MA 06/17/1992			T		8155088004	BOSTON	MA
9318306	JOS. D. CARNEY & ASSC.	P	MA 09/30/1992			T		8680003009	BOSTON MSA	MA
9117538	PRISCILLA MARSTON	P	MA 07/15/1991		09/25/1991	S		8155265008	GREATER BOSTON	MA
9215942	WESTERN SIERRA	P	TX 02/18/1992		05/20/1992	T		8155441011	LAWRENCE PMSA	MA
9211922	LAWRENCE FRAIBERG	P	MA 07/07/1992		08/05/1992	T		8155414100	LAWRENCE-HAVERHILL	MA
9318283	CT COMM. CORP.	P	MA 09/29/1992			T		8155403009	LAWRENCE/HAVRHIL MSA	MA
9218253	CT COMMUNICATIONS CORP	P	MA 09/29/1992			T		8155398005	LOWELL	MA
9218266	PAUL LIKINS	P	MA 09/30/1992			T		868001002	LOWELL, MA-NH PMSA	MA
9200737	BACHOW, PAUL S.	P	MA 05/12/1992		08/05/1992	T		8155971004	NEW BEDFORD	MA
9211548	FOUR M MLDS GROUP	P	MA 05/11/1992		07/08/1992	T		8155963018	NEW BEDFORD	MA
9218056	ORANGE WIRELESS PARTNERS	P	MA 05/11/1992			T		8155962011	NEW BEDFORD	MA
9318612	CELULARVISION	P	MA 10/02/1992			T		8680011005	NEW BEDFORD PMSA	MA
9218250	CT COMMUNICATIONS CORP	P	MA 09/29/1992			T		8155398002	SALEM-GLOUCESTER	MA
9318500	CONNECTICUT HOME THEATER	P	MA 10/01/1992			T		8680013001	SPRINGFIELD	MA
9318271	IVAN L. WOLFF	P	MA 09/30/1992			T		868001007	SPRINGFIELD MSA	MA
9215516	GARTH MOSS	P	MA 01/14/1992		02/05/1992	S			SPRINGFIELD PMSA	MA
9200732	BACHOW, PAUL S.	P	MA 05/12/1992		08/05/1992	T		8155968001	WORCESTER	MA
9211554	FOUR M MLDS GROUP	P	MA 05/11/1992		07/08/1992	T		8155963012	WORCESTER	MA
9215517	GENE C. SABORIN	P	MA 01/14/1992		02/05/1992	S			WORCESTER	MA
9218143	S.E. CONE, JR.	P	MA 05/11/1992			T		8155964010	WORCESTER	MA
9218257	CT COMMUNICATIONS CORP	P	MA 09/29/1992			T		8155398008	WORCESTER	MA
9318307	JOS. D. CARNEY & ASSOC.	P	MA 09/30/1992			T		8680003010	WORCESTER	MA
9200429	ACOR, EVERETT T. JR.	P	MA 02/20/1992		04/24/1992	T		8155456010	WORCESTER MSA	MA
9218047	ORNG. WIRE PART.	P	MA 05/12/1991			T		8155962014	WORCESTER PMSA	MA
9318620	CELULARVISION	P	MA 10/16/1992			T		8680052002	WORCHESTER PMSA	MA
9218299	JOS. D. CARNEY & ASSC.	P	MD 09/30/1992			T		8680003002		MD
9210585	BRUCE BOSSARD	P	MD 12/03/1991		01/15/1992	TE		8155916003	BALTIMORE	MD
9211191	LINDEMANN, FRAYDA B.	P	MD 03/16/1992		05/13/1992	T		8155611004	BALTIMORE	MD
9215615	DIANE WECHSLER	P	MD 01/24/1992		03/18/1992	T		8155254001	BALTIMORE	MD
9200262	ACOR, EVERETT T. JR.	P	MD 02/18/1992		04/15/1992	T		8155441008	BALTIMORE MSA	MD
9215888	VIDEO COMMUNICATIONS	P	MD 02/26/1992		05/13/1992	T		8155482006	BALTIMORE MSA	MD
9216480	NORTHEAST WIRELESS	P	ME 03/16/1992		08/05/1992	T		8155609010	PORTLAND MSA	ME
9218278	CT COMM. CORP.	P	MI 09/29/1992			T		8155403004		MI
9218251	CT COMMUNICATIONS CORP	P	MI 09/29/1992			T		8155398003	ANN ARBOR	MI
9215512	M3 ILLINOIS TELECOM CORP	P	PA 01/13/1992		02/05/1992	S			ANN ARBOR PMSA	MI
9216684	SALLIE DIFEDLE	P	MI 04/06/1992		08/05/1992	T		8155813005	ANN ARBOR PMSA	MI
9218024	M A H INC	P	MI 05/04/1992			T		8155939004	ANN ARBOR PMSA	MI
9111266	LDH INTERNATIONAL INC	P	MI 02/11/1991		05/15/1991	TE		8155682006	DETROIT	MI
9112778	E 82 LTD	P	MI 07/17/1991		08/21/1991	TE		8155264005	DETROIT	MI
9318286	MARK SILBERMAN	P	MI 10/02/1992			T			DETROIT	MI
9318294	JOS. D. CAREY & ASSC.	P	MI 10/02/1992			T		8680002007	DETROIT MSA	MI
9211860	HIGH BAND BRDSC. CORP.	P	MI 06/23/1992		07/09/1992	T		8155098004	FLINT MSA	MI
9218158	ALTN. BRODCST. NETWORK	P	MI 05/27/1992			T		8155025010	FLINT MSA	MI
9211080	GHZ BROADCASTING INC	P	MI 02/24/1992		05/06/1992	T		8155456012	GRAND RAPIDS	MI
9218090	HERBERT S. MEEKER	P	MI 06/09/1992			T		8155065004	GRAND RAPIDS	MI
9318614	CELULARVISION	P	MI 10/02/1992			T		8680011008	GRAND RAPIDS PMSA	MI
9218206	METTLER COMMUNICATIONS	P	MI 08/07/1992			T		8155232006	JACKSON	MI
9318613	CELULARVISION	P	MI 10/02/1992			T		8680011006	LANSING PMSA	MI
9215514	M3 ILLINOIS TELECOM CORP	P	PA 01/13/1992		02/05/1992	S		8155177016	SAG.BAY CTY.MDLD.MSA	MI
9211374	MARILYN DONNELLY	P	MI 04/08/1992		06/24/1992	T		8155815008	SAGINAW-BAY CITY	MI
9218262	CT COMMUNICATIONS CORP	P	MI 09/29/1992			T		8155404004	SAGINAW-BAY CITY-	MI
9218027	MAH INC	P	MI 05/04/1992			T		8155939012	SAGINAW/BAY CITY MSA	MI
9216650	PAUL D. RICE	P	MN 04/14/1992		08/05/1992	T		8155880011	MINN/ST PAUL	MN
9215550	R&R TELECOMMUNICATION	P	MN 01/21/1992		02/12/1992	S		8155234008	MINN/ST. PAUL MSA	MN
9215867	DR. KIM SLOAN	P	MN 02/11/1992		05/13/1992	S		8155386008	MINN/ST. PAUL MSA	MN

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9215867	DR. KIM SLOAN	P	MN	02/11/1992		05/13/1992	S		8155386008	MINN/ST. PAUL MSA	MN
9200419	PAUL S. BACHOW	P	MN	03/16/1992			T		8155610004	MINNEAPOLIS	MN
9200425	JOHN E. BRENNAN	P	MN	03/18/1992		06/24/1992	T		8155612003	MINNEAPOLIS	MN
9211187	LINDEMANN, FRAYDA B.	P	MN	03/18/1992		05/13/1992	T		8155612005	MINNEAPOLIS	MN
9210590	BRYANNET	P	MN	12/05/1991		01/15/1992	TE		8155938001	MINNEAPOLIS-ST PAUL	MN
9210590	BRYANNET	P	MN	12/09/1991		01/15/1992	T		8155938001	MINNEAPOLIS-ST PAUL	MN
9216577	WESTERN SIERRA	P	MN	03/16/1992		08/05/1992	S		8155609001	MINNEAPOLIS/ST PAUL	MN
9211915	FARROW & STINSKI	P	MN	07/06/1992		08/05/1992	T		8155138002	MINNEAPOLS. ST PAUL	MN
9111271	LDH INTERNATIONAL INC	P	MO	02/08/1991		05/15/1991	TE		8155674009	KANSAS CITY	MO
9117536	ANDREW WAHL	P	MO	07/15/1991		09/25/1991	S			KANSAS CITY	MO
9218164	ALDA MULTICHANNELS LTD	P	MO	06/17/1992			T		8155088006	KANSAS CITY	MO
9118177	HOVNANIAN, ARMEN	P	MO	08/26/1991		10/09/1991	TE		8155469001	ST LOUIS	MO
9200564	ALDA MULTICHANNELS LTD	P	MO	04/06/1992		07/15/1992	T		8155814004	ST LOUIS	MO
9200744	BACHOW, PAUL S.	P	MO	05/14/1992		08/05/1992	T		8155983003	ST LOUIS	MO
9211684	FOUR M MLDS GROUP	P	MO	05/18/1992		07/15/1992	T		8155996008	ST LOUIS	MO
9215435	WIRELESS CABLE LTD	P	KY	12/09/1991		02/05/1992	S		8155940017	ST LOUIS	MO
9216673	PATRICIA B. MAILANI	P	MO	04/06/1992		08/05/1992	T		8155810007	ST LOUIS	MO
9218068	ORANGE WIRELESS PARTNERS	P	MO	05/19/1992			T		8155996014	ST LOUIS	MO
9218078	M & C VICK PARTNERS	P	MO	05/18/1992			T		8155977014	ST. LOUIS	MO
9218127	S.E. CONE, JR.	P	MO	05/18/1992			T		8155997006	ST. LOUIS	MO
9318624	CELULARVISION	P	MO	10/06/1992			T		8680020002	ST. LOUIS PMSA	MO
9215616	R&R TELECOMMUNICATION	P	MO	01/24/1992		03/18/1992	T		8155254002	ST. LOUIS, MSA	MO
9215616	R&R TELECOMMUNICATION	P	MO	01/24/1992		03/18/1992	T		8155254002	ST. LOUIS, MSA	MO
9318502	MATHES, PHILIP H.	P	MS	10/02/1992			T		8680009003	JACKSON	MS
9318512	BUTLER, HILLARY	P	MS	10/15/1992			T		8680048005	JACKSON	MS
9200730	BACHOW, PAUL S.	P	NC	05/12/1992		08/05/1992	T		8155969001	CHAFRLOTTE	NC
9118118	BOSSARD, THOMAS H.	P	NC	08/19/1991		10/09/1991	TE		8155430008	CHARLOTTE	NC
9210971	EDELSON, HARRY	P	NC	01/27/1992		03/25/1992	T		8155255002	CHARLOTTE	NC
9211716	KRZETTOWSKI, ANDREW	P	NC	05/26/1992		07/15/1992	T		8155019004	CHARLOTTE	NC
9218042	ORANGE WIRELESS PARTNERS	P	NC	05/12/1992			T		8155962017	CHARLOTTE	NC
9218135	CONE ENTERPRISES, INC.	P	NC	05/11/1992			T		8155964018	CHARLOTTE	NC
9218291	JOS. D. CAREY & ASSC.	P	NC	09/30/1992			T		8680002004	CHARLOTTE	NC
9215890	VIDEO COMMUNICATIONS	P	PA	02/26/1992		05/13/1992	T		8155481007	CHARLOTTE MSA	NC
9211557	FOUR M MLDS GROUP	P	NC	05/11/1992		07/08/1992	T		8155963009	CHAROLETTE	NC
9211609	FM VIDEO BROADCASTERS	P	NC	05/12/1992		07/08/1992	T		8155969005	FAYETTEVILLE	NC
9210868	HAYES, THOMAS	P	NC	01/17/1992		02/19/1992	T		8155191002	GREENSBORO	NC
9215366	SHENANDOAH GROUP	P	NC	12/05/1991		01/29/1992	S			GREENSBORO	NC
9216600	P.M.J. SECURITIES INC	P	NC	03/16/1992		08/05/1992	C		8155705006	GREENSBORO	NC
9216613	TELECOM/HADDOCK INVESTOR	P	NC	03/24/1992		08/05/1992	C		8155703008	GREENSBORO	NC
9216634	TELECOM INVESTMENT CORP	P	NC	03/16/1992		08/05/1992	T		8155704006	GREENSBORO	NC
9218293	JOS. D. CARNEY & ASSC.	P	NC	09/30/1992			T		8680002006	GREENSBORO	NC
9215636	PRINCETON SCIENTIFIC	P	NC	01/24/1992		03/18/1992	T		8155255006	GREENSBORO MSA	NC
9216586	PATRICIA B. MAILANI	P	NC	03/06/1992		08/05/1992	T		8155564013	GREENSBORO MSA	NC
9318629	BSV PARTNERSHIP	P	NC	10/06/1992			T		8680020007	GREENSBORO PMSA	NC
9200423	BACHOW, PAUL S.	P	NC	03/13/1992			T			RALEIGH	NC
9200427	JOHN E. BRENNAN	P	NC	03/16/1992		06/24/1992	T		8155612001	RALEIGH	NC
9211186	LINDEMANN, FRAYDA B.	P	NC	03/18/1992		05/13/1992	T		8155612006	RALEIGH	NC
9210584	CAMBRIDGE RESEARCH LABS	P	NC	12/05/1991		01/15/1992	TE		8155916004	RALEIGH-DURHAM	NC
9200594	BSV PARTNERSHIP	P	NC	04/15/1992			T		8155896005	RALEIGH/DURHAM	NC
9210861	CORNBLATT, ARNOLD	P	NC	01/15/1992		02/19/1992	T		8155178006	RALEIGH/DURHAM	NC
9211459	ILOHCA CORP	P	NC	04/21/1992		07/08/1992	T		8155901012	RALEIGH/DURHAM	NC
9218120	RONALD STINSKI	P		07/06/1992			T		8155138001	BISMARCK	ND
9216581	NORTHWEST COMMUNICATIONS	P	ND	03/16/1992		08/05/1992	T		8155617005	WILLISTON	ND
9200542	FAITH C. AMBY	P	NE	04/06/1992			T		8155808009	OMAHA	NE
9200548	BSV PARTNERSHIP	P	NE	04/06/1992			T		8155815006	OMAHA	NE
9211313	HORNBY, HAROLD	P	NE	04/07/1992		06/03/1992	T		8155810005	OMAHA	NE

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9215431	WIRELESS CABLE LTD	P	KY 12/09/1991		02/05/1992	S			OMAHA	NE
9215459	DIANE WECHSLER	P	NE 12/26/1991		02/05/1992	TE			OMAHA	NE
9218092	SANFORD R. ROBERTSON	P	NE 06/12/1992			T		8155075007	OMAHA	NE
9218036	M A H INC.	P	NJ 05/04/1992			T		8155939009		NJ
9210862	CELLULARVISION	P	NJ 01/15/1992		02/19/1992	T		8155183006	ATLANTIC CITY	NJ
9215508	M3 ILLINOIS TELECOM CORP	P	NJ 01/13/1992		02/05/1992	S			ATLANTIC CITY	NJ
9216685	ORION BRROADCASTING	P	NJ 04/03/1992		08/05/1992	T		8155796007	ATLANTIC CITY	NJ
9218280	CT COMM. CORP.	P	NJ 09/29/1992			T		8155403006	ATLANTIC CITY	NJ
9218032	MAH INC	P	NJ 05/04/1992			T		8155939003	ATLANTIC CITY MSA	NJ
9200296	CELLULAR VISION, INC.	P	NJ 03/02/1992			T			BERGEN-PASSAIC	NJ
9211683	KRZETTOWSKI, ANDREW J.	P	NJ 05/18/1992			T		8155995008	BERGEN-PASSIAC	NJ
9211924	FRAIBERG, LAWRENCE	P	NJ 07/06/1992			T		8155141003	BERGEN-PASSIAC	NJ
9215628	ROBERT E. LA BLANC	P	NJ 01/24/1992		03/18/1992	T		8155306007	BERGEN-PASSIAC PMSA	NJ
9215628	ROBERT E. LA BLANC	P	NJ 01/24/1992		03/18/1992	T		8155306007	BERGEN-PASSIAC PMSA	NJ
9211075	GHZ BROADCASTING INC	P	NJ 02/24/1992		05/06/1992	T		8155456017	BERGEN/PASSAIC	NJ
9200295	CELLULARVISION	P	NJ 03/02/1992			T		8155513004	JERSEY CITY	NJ
9211681	KRZETTOWSKI, ANDREW J.	P	NJ 05/18/1992			T		8155995010	JERSEY CITY	NJ
9211925	FRAIBERG, LAWRENCE	P	NJ 07/06/1992			T		8155141002	JERSEY CITY	NJ
9215627	ROBERT E. LA BLANC	P	NJ 01/24/1992		03/18/1992	T		8155306005	JERSEY CITY PMSA	NJ
9215627	ROBERT E. LA BLANC	P	NJ 01/24/1992		03/18/1992	T		8155306005	JERSEY CITY PMSA	NJ
9215938	WESTERN SIERRA	P	NJ 02/18/1992		05/20/1992	T		8155441013	JERSEY CITY PMSA	NJ
9218041	ORANGE WIRELESS PARTNERS	P	NJ 05/12/1992			T		8155962016	LONG BEACH	NJ
9218134	CONE, S.E., JR.	P	NJ 05/14/1992			T		8155964019	LONG BEACH	NJ
9200725	BACHOW, PAUL S.	P	NJ 05/12/1992			T		8155970001	LONG BRANCH	NJ
9211558	FOUR M MLDS GROUP	P	NJ 05/11/1992			T		8155963008	LONG BRANCH	NJ
9200298	CELLULAR VISION, INC.	P	NJ 03/02/1992			T			MIDDLESEX-SOMERSET	NJ
9211918	HASCOE, NORMAN	P	NJ 07/06/1992			T		8155141010	MIDDLESEX-SOMERSET	NJ
9218118	FREEDOM TECHNOLOGIES	P	NJ 07/06/1992			T		8155143002	MIDDLESEX-SOMERSET	NJ
9211066	GHZ BROADCASTING INC	P	NJ 02/20/1992		05/06/1992	T		8155456018	MIDDLESEX/SOMERSET	NJ
9200297	CELLULAR VISION, INC.	P	NJ 03/02/1992			T			MONMOUTH-OCEAN	NJ
9211923	FRAIBERG, LAWRENCE	P	NJ 07/06/1992			T		8155141004	MONMOUTH-OCEAN	NJ
9215814	SMITH, KATHLEEN	P	NJ 02/10/1992		04/29/1992	T		8155370002	MONMOUTH-OCEAN PMSA	NJ
9318602	BSV PARTNERSHIP	P	NJ 10/07/1992			T		8680027003	MONMOUTH/OCEAN	NJ
9215939	WESTERN SIERRA	P	NJ 02/18/1992		05/20/1992	T		8155441013	MONMOUTH/OCEAN PMSA	NJ
9210586	NICHOLAS GARFINKLE	P	NJ 12/05/1991		01/15/1992	TE		8155916002	NEWARK	NJ
9210713	FEINBERG, JUDY	P	NJ 12/30/1991		02/12/1992	TE		8155037001	NEWARK	NJ
9211443	HORNBY, HENRI R.	P	NJ 04/21/1992		06/24/1992	T		8155902001	NEWARK	NJ
9200563	CELLULAR VISION, INC.	P	NJ 04/06/1992			T		8155813002	TRENTON	NJ
9215511	M3 ILLINOIS TELECOM CORP	P	PA 01/13/1992		02/05/1992	S			TRENTON	NJ
9218275	CT COMM. CORP.	P	NJ 09/29/1992			T		8155403003	TRENTON PMSA	NJ
9218028	MAH INC	P	NJ 05/04/1992			T		8155939013	WILMINGTON PMSA	NJ
9210762	BUCHWALD, JOSEPH B.	P	NM 01/02/1992		02/12/1992	TE		8155116012	ALBEQUERQUE	NM
9200458	JEFFERY B. CROWLEY	P	NM 04/13/1992		07/08/1992	T		8155877003	ALBUQUERQUE	NM
9200597	BMB PARTNERSHIP	P	NM 04/13/1992		07/15/1992	T		8155878005	ALBUQUERQUE	NM
9210700	AKZ INVESTORS	P	NM 12/24/1991		02/12/1992	TE		8155998003	ALBUQUERQUE	NM
9216591	SENVISTA GENERAL	P	NM 03/06/1992		08/05/1992	T		8155757005	ALBUQUERQUE	NM
9215813	SMITH, KATHLEEN	P	NM 02/10/1992		04/29/1992	T		8155370003	ALBUQUERQUE MSA	NM
9216585	PATRICIA B. MAILANI	P	NM 03/06/1992		08/05/1992	T		8155564014	ALBUQUERQUE MSA	NM
9218212	HADDON, PERRY W.	P	NM 08/10/1992			T		8155236007	CLOVIS	NM
9218216	HADDON, PERRY W.	P	NM 08/10/1992			T		8155236008	HOBBS	NM
9211941	HADDON, PERRY W.	P	NM 07/20/1992		10/15/1992	T		8155172003	LAS CRUCES	NM
9218219	HADDON, PERRY W.	P	NM 08/10/1992			T		8155236009	ROSWELL	NM
9218180	HADDON, PERRY W.	P	NM 06/20/1992			T		8155172001	SANTA FE	NM
9218217	JACOBS, MICHAEL	P	NV 08/10/1992			T		8155236002	CARSON CITY	NV
9200428	JOHN E. BRENNAN	P	NV 03/16/1992		06/24/1992	T		8155612002	LAS VEGAS	NV
9211189	LINDEMANN, FRAYDA B.	P	NV 03/18/1992		05/13/1992	T		8155611001	LAS VEGAS	NV

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9211190	BACHOW, PAUL S.	P	NV 03/18/1992		05/13/1992	T		8155611005	LAS VEGAS	NV
9215350	SUITE 12 GROUP	P	FL 11/25/1991		01/15/1992	TE			LAS VEGAS	NV
9218167	ALDA MULTICHANNELS LTD	P	NV 06/17/1992			T		8155088003	LAS VEGAS	NV
9218187	ALDA MULTICHANNELS LTD	P	NV 07/10/1992			T		8155154003	LAS VEGAS	NV
9215625	ROBERT E. LA BLANC	P	NV 01/24/1992		03/18/1992	T		8155255004	LAS VEGAS MSA	NV
9215625	ROBERT E. LA BLANC	P	NV 01/24/1992		03/18/1992	T		8155255004	LAS VEGAS MSA	NV
9216022	VIRGINIA COMMUNICATIONS	P	NV 02/20/1992		06/10/1992	T		8155456011	LAS VEGAS MSA	NV
9200547	BSV PARTNERSHIP	P	NV 04/06/1992		07/15/1992	T		8155815002	RENO	NV
9210657	CYRUS PARTNERSHIP	P	NV 12/10/1991		02/05/1992	TE		8155940007	RENO	NV
9211132	HORNBY, HAROLD	P	NV 03/09/1992		05/13/1992	T		8155564005	RENO	NV
9211132	HORNBY, HAROLD	P	NV 03/09/1992		05/13/1992	T		8155564005	RENO	NV
9211345	FRIEND, JOHNATHAN E.	P	NV 04/07/1992		06/17/1992	T		8155808004	RENO	NV
9200528	ASSOCIATED MDS CORP.	P	NY 04/06/1992		07/15/1992	T		8155808001	ALBANY	NY
9200550	BACHOW, PAUL S.	P	NY 04/06/1992		07/15/1992	T		8155817006	ALBANY	NY
9200584	CONE, S.E., JR	P	NY 04/06/1992		07/15/1992	T		8155811005	ALBANY	NY
9211175	KINGSWOOD ASSOCIATES	P	NY 03/17/1992		05/13/1992	T		8155609009	ALBANY	NY
9211346	HORNBY, HENRI R.	P	NY 04/07/1992		06/17/1992	T		8155808008	ALBANY	NY
9211375	RUSSELL HEDDEN	P	NY 04/08/1992		06/24/1992	T		8155813003	ALBANY	NY
9218005	ORANGE WIRELESS PARTNERS	P	NY 04/07/1992			T		8155811006	ALBANY	NY
9215485	R&R TELECOMMUNICATION	P	NY 01/03/1992		02/05/1992	S			ALBANY, SCHEN, TROY	NY
9215881	MICHAEL S. SIEGEL	P	NY 02/26/1992		05/13/1992	T		8155482002	ALBANY,SCHEN,TROY	NY
9211260	EASTERN MICROWAVE, INC.	P	NY 04/03/1992		06/03/1992	T		8155771002	ALBANY-SCHENECTADY-T	NY
9200663	BSV PARTNERSHIP	P	PA 06/16/1992		07/29/1992	T		8155082010	ALBANY/TROY	NY
9211802	EASTERN MICROWAVE, INC.	P	NY 06/04/1992		07/29/1992	T		8155048005	BINGHAMTON-JOHNSON	NY
9211619	ILOHCA CORP	P	NY 05/14/1992		07/08/1992	T		8155982007	BUFFALE PMSA	NY
9200727	BACHOW, PAUL S.	P	NY 05/12/1992		08/05/1992	T		8155969004	BUFFALO	NY
9210448	BOSSARD, MARK	P	NY 11/26/1991		04/15/1992	TE		8155874004	BUFFALO	NY
9211181	KINGSWOOD ASSOCIATES	P	NY 03/17/1992		05/13/1992	T		8155609007	BUFFALO	NY
9211539	EASTERN MICROWAVE, INC.	P	NY 05/08/1992		07/08/1992	T		8155954004	BUFFALO	NY
9211605	FOUR M MLDS GROUP	P	NY 05/11/1992		07/08/1992	T		8155963001	BUFFALO	NY
9211673	ASSOCIATED MDS CORP.	P	NY 05/18/1992		07/15/1992	T		8155990010	BUFFALO	NY
9218147	S.E. CONE, JR.	P	NY 05/11/1992			T		8155964006	BUFFALO	NY
9218314	JOS. D. CARNEY & ASSOC.	P	NY 09/30/1992			T		8680004010	BUFFALO MSA	NY
9215880	VIDEO COMMUNICATIONS	P	NY 02/26/1992		05/13/1992	T		8155482003	BUFFALO PMSA	NY
9200213	CAMBRIDGE MANAGEMENT	P	NY 01/24/1992		04/08/1992	T		8155306003	BUFFALO, NY PMSA	NY
9211804	EASTERN MICROWAVE, INC.	P	NY 06/04/1992			T		8155048003	ELMIRA-CORNING	NY
9211803	EASTERN MICROWAVE, INC.	P	NY 06/04/1992		07/29/1992	T		8155048004	ITHACA MSA	NY
9211347	HORNBY, HENRI R.	P	NY 04/07/1992		06/17/1992	T		8155808007	NASSAU-SUFFOLK	NY
9215626	ROBERT E. LA BLANC	P	NY 01/24/1992		03/18/1992	T		8155306006	NASSAU-SUFFOLK PMSA	NY
9215626	ROBERT E. LA BLANC	P	NY 01/24/1992		03/18/1992	T		8155306006	NASSAU-SUFFOLK PMSA	NY
9200791	CELLTEL COMMUNICATIONS	P	NY 07/31/1992		09/02/1992	T		8155212009	NEW YORK	NY
9210656	HYE CREST MANAGEMENT	MP	NY 12/17/1991		01/29/1992	TE		8155966003	NEW YORK	NY
9218302	JOS. D. CARNEY & ASSC.	P	NY 09/30/1992			T		8680003005	NEW YORK MSA	NY
9218182	NIAGRA PARTNERS	P	NY 06/20/1992			T		8155172005	NIAGRA FALLS PMSA	NY
9218182	NIAGRA PARTNERS	P	NY 06/20/1992			T		8155172005	NIAGRA FALLS PMSA	NY
9218182	NIAGRA PARTNERS	P	NY 06/20/1992			T		8155172005	NIAGRA FALLS PMSA	NY
9218182	NIAGRA PARTNERS	P	NY 06/20/1992			T		8155172005	NIAGRA FALLS PMSA	NY
9218182	NIAGRA PARTNERS	P	NY 06/20/1992			T		8155172005	NIAGRA FALLS PMSA	NY
9215441	NORTON GARFINKLE	P	NY 12/04/1992		02/05/1992	TE			OCEANSIDE	NY
9218252	CT COMMUNICATIONS CORP	P	NY 09/29/1992			T		8155398004	ORANGE COUNTY	NY
9216024	WESTERN SIERRA	P	NY 02/18/1992		06/10/1992	T		8155441016	ORANGE COUNTY PMSA	NY
9211805	EASTERN MICROWAVE, INC.	P	NY 06/04/1992			T		8155048002	POUGHKEEPSIE-KINGSTO	NY
9200714	ASSOCIATED MDS CORP.	P	NY 05/15/1992		08/05/1992	T		8155990004	ROCHESTER	NY
9200723	BACHOW, PAUL S.	P	NY 05/12/1992		08/05/1992	T		8155970003	ROCHESTER	NY
9211180	KINGSWOOD ASSOCIATES	P	NY 03/17/1992		05/13/1992	T		8155609008	ROCHESTER	NY
9211180	KINGSWOOD ASSOCIATES	P	NY 03/17/1992		05/13/1992	T		8155609008	ROCHESTER	NY

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9211601	FOUR M MLDS GROUP	P	NY	05/11/1992			T		8155963005	ROCHESTER	NY
9211712	EASTERN MICROWAVE, INC.	P	NY	05/20/1992		07/15/1992	T		8155008001	ROCHESTER	NY
9211826	HASCOE, NORMAN	P	NY	06/17/1992			T		8155087003	ROCHESTER	NY
9216642	SCNY COMMUNICATIONS INC	P	NY	03/16/1992			T		8155703016	ROCHESTER	NY
9218043	ORANGE WIRELESS PARTNERS	P	NY	05/12/1992			T		8155962003	ROCHESTER	NY
9218105	ALEXANDER N. MITCHELL	P	NY	06/16/1992			T		8155082005	ROCHESTER	NY
9218145	S.E. CONE, JR.	P	NY	05/11/1992			T		8155964008	ROCHESTER	NY
9218153	ALTERNATIVE BROADCAST NT	P	NY	05/27/1992			T		8155025005	ROCHESTER MSA	NY
9218313	JOS. D. CARNEY & ASSOC.	P	NY	09/30/1992			T		8680004009	ROCHESTER MSA	NY
9318621	CELULARVISION	P	NY	10/16/1992			T		8680052007	ROCHESTER PMSA	NY
9211079	GHZ BROADCASTING INC	P	NY	02/24/1992		05/06/1992	T		8155456013	SYRACUSE	NY
9211540	EASTERN MICROWAVE, INC.	P	NY	05/08/1992		07/08/1992	T		8155954003	SYRACUSE	NY
9211812	KING BROADCASTING ASSOC	P	NY	06/08/1992			T		8155058004	SYRACUSE	NY
9211832	HIGH BAND BROADCASTING	P	NY	06/18/1992			T		8155091002	SYRACUSE	NY
9216644	SCNY COMMUNICATIONS INC	P	NY	03/16/1992			T		8155703019	SYRACUSE	NY
9218097	JEANNE P. ROBERTSON	P	NY	06/12/1992			T		8155075004	SYRACUSE	NY
9218242	RICHARD CARL LEVY PART	P	NY	09/16/1992			T		8155357001	SYRACUSE	NY
9211806	EASTERN MICROWAVE, INC.	P	NY	06/04/1992			T		8155048001	UTICA-ROME	NY
9218007	ORANGE WIRELESS PARTNERS	P	OH	04/07/1992			T		8155811009		OH
9211616	ILOHCA CORP	P	OH	05/14/1992		07/08/1992	T		8155982010	AKRON	OH
9218243	RICHARD CARL LEVY PART	P	OH	09/16/1992			T		8155357003	AKRON	OH
9318288	JOS. D. CARNEY & ASSC.	P	OH	10/02/1992			T		8680002001	AKRON	OH
9318513	ROY, SHIELA ANN	P	OH	10/15/1992			T		8680048003	AKRON	OH
9215622	R&R TELECOMMUNICATION	P	OH	01/24/1992		03/18/1992	T		8155255010	AKRON PMSA	OH
9215622	R&R TELECOMMUNICATION	P	OH	01/24/1992		03/18/1992	T		8155255010	AKRON PMSA	OH
9218172	CHARLES D. SNELLING	P	OH	06/12/1992			T		8155142002	AKRON PMSA	OH
9211859	HIGH BAND BROADCASTING	P	OH	06/22/1992		07/29/1992	T		8155098005	AKRORN	OH
9218113	MARK SILBERMAN	P	OH	06/30/1992			T		8155121003	CANTON	OH
9218261	CT COMMUNICATIONS CORP	P	OH	09/29/1992			T		8155404003	CANTON	OH
9216579	NORTHEAST WIRELESS	P	OH	03/16/1992		08/05/1992	T		8155609003	CANTON MSA	OH
9318312	JOS. D. CARNEY & ASSOC.	P	OH	10/02/1992			T		8680004008	CANTON MSA	OH
9211617	ILOHCA CORP	P		05/14/1992		07/07/1908	T		8155982009	CINCINATTI	OH
9117818	STUART M. PERLOW	P	OH	09/11/1991		10/16/1991	TE			CINCINNATI	OH
9211687	FOUR M MLDS GROUP	P	OH	05/18/1992		07/15/1992	T		8155996005	CINCINNATI	OH
9215633	PRINCETON SCIENTIFIC	P	OH	01/24/1992		03/18/1992	T		8155255012	CINCINNATI	OH
9218067	ORANGE WIRELESS PARTNERS	P	OH	05/19/1992			T		8155996015	CINCINNATI	OH
9218077	MAURICE & CHARLOTTE VICK	P	OH	05/18/1992			T		8155997015	CINCINNATI	OH
9218126	S.E. CONE, JR.	P	OH	05/18/1992			T		8155997007	CINCINNATI	OH
9318292	JOS. D. CARNEY & ASSC.	P	OH	10/02/1992			T		8680002005	CINCINNATI MSA	OH
9318623	CELULARVISION	P	OH	10/06/1992			T		8680020001	CINCINNATI PMSA	OH
9112913	EVANSTON TRANSMISSION CO	P	OH	07/30/1991		09/25/1991	TE		8155346003	CLEVELAND	OH
9211682	ANDREW J. KRZETTOWSKI	P	OH	05/19/1992		07/15/1992	T		8155995009	CLEVELAND	OH
9211690	FOUR M MLDS GROUP	P	OH	05/18/1992		07/15/1992	T		8155996002	CLEVELAND	OH
9215632	PRINCETON SCIENTIFIC	P	OH	01/24/1992		03/18/1992	T		8155306002	CLEVELAND	OH
9218073	MARK K. SHAH	P	OH	05/19/1992			T		8155995011	CLEVELAND	OH
9218074	MAURICE & CHARLOTTE VICK	P	OH	05/19/1992			T		8155997013	CLEVELAND	OH
9218079	ORANGE WIRELESS PARTNERS	P	OH	05/18/1992			T		8155996010	CLEVELAND	OH
9218124	S.E. CONE, JR.	P	OH	05/18/1992			T		8155997009	CLEVELAND	OH
9318290	JOS. D. CARNEY & ASSC.	P	OH	10/02/1992			T		8680002002	CLEVELAND MSA	OH
9200526	ASSOCIATED MDS CORP.	P	OH	04/06/1992			T		8155811013	COLUMBUS	OH
9200552	BACHOW, PAUL S.	P	OH	04/06/1992			T		8155817004	COLUMBUS	OH
9200589	PAUL LIKINS	P	OH	04/06/1992			T		8155811011	COLUMBUS	OH
9200595	BMB PARTNERSHIP	P	OH	04/13/1992		07/15/1992	T		8155878002	COLUMBUS	OH
9211340	HORNBY, HENRI R.	P	OH	04/02/1992		06/17/1992	T		8155810008	COLUMBUS	OH
9211421	KELLY, PAUL M.	P	OH	04/14/1992		06/24/1992	T		8155880010	COLUMBUS	OH
9215522	SAVPHILL GROUP	P	OH	01/14/1992		02/05/1992	TE			COLUMBUS	OH

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9215546	DIANE WECHSLER	P	OH	01/21/1992		02/12/1992	T			COLUMBUS	OH
9215879	VIDEO COMMUNICATIONS	P	OH	02/26/1992		02/13/1992	S		8155482004	COLUMBUS MSA	OH
9210598	DAYTON WIRELESS	P	OH	12/10/1991		01/15/1992	TE		8155940003	DAYTON	OH
9216605	P.M.J. SECURITIES INC	P	OH	03/16/1992		08/05/1992	C		8155705011	DAYTON	OH
9216614	TELECOM/HADDOCK INVESTOR	P	OH	03/24/1992		08/05/1992	C		8155703005	DAYTON	OH
9216631	TELECOM INVESTMENT CORP	P	OH	03/16/1992		08/05/1992	T		8155704009	DAYTON	OH
9215617	R&R TELECOMMUNICATION	P	OH	01/24/1992		03/18/1992	T		8155254004	DAYTON MSA	OH
9215617	R&R TELECOMMUNICATION	P	OH	01/24/1992		03/18/1992	T		8155254004	DAYTON MSA	OH
9318295	JOS. D. CARNEY & ASSC.	P	OH	10/02/1992			T		8680002008	DAYTON MSA	OH
9318611	CELULARVISION	P	OH	10/02/1992			T		8680011002	DAYTON PMSA	OH
9211861	HIGH BAND BROADCASTING	P	OH	06/23/1992		07/29/1992	T		8155098003	HAMILTON	OH
9218156	ALTERNATIVE BROADCAST NT	P	OH	05/27/1992			T		8155025008	HAMILTON	OH
9215893	SENVISTA GENERAL	P	OH	02/26/1992		05/13/1992	T		8155481004	LIMA	OH
9218103	PMB PARTNERSHIP	P	OH	06/16/1992			T		8155082008	LIMA	OH
9211947	MARK J. KONRAD	P	OH	07/20/1992		08/05/1992	T		8155177001	TOLEDO	OH
9215892	SENVISTA GENERAL	P	OH	02/26/1992		05/13/1992	T		8155481005	TOLEDO	OH
9218110	PMB PARTNERSHIP	P	OH	06/17/1992			T		8155082013	TOLEDO	OH
9318301	JOS. D. CAREY & ASSC.	P	OH	10/02/1992			T		8680003004	TOLEDO	OH
9215935	ROBERT ROSENKRANZ	P	AL	02/13/1992		05/20/1992	T		8155405004	TOLEDO MSA	OH
9218175	CHARLES D. SNELLING	P	OH	06/06/1992			T		8155142004	TOLEDO MSA	OH
9211184	FM VIDEO BROADCASTERS	P	OH	03/17/1992		05/13/1992	T		8155609005	YOUNGSTOWN	OH
9218112	MARK SILBERMAN	P	OH	07/01/1992			T		8155121006	YOUNGSTOWN	OH
9318304	JOS. D. CARNEY & ASSOC.	P	OH	10/02/1992			T		8680003007	YOUNGSTOWN MSA	OH
9218049	ORANGE WIRELESS PARTNERS	P	OK	05/12/1992			T		8155962019		OK
9200209	CAMBRIDGE MANAGEMENT	P	OK	01/24/1992		04/08/1992	T		8155254013	OKLAHOMA CITY	OK
9200726	BACHOW, PAUL S.	P	OK	05/12/1992			T		8155970007	OKLAHOMA CITY	OK
9211553	FOUR M MLDS GROUP	P	OK	05/11/1992			T		8155963013	OKLAHOMA CITY	OK
9211811	KRZETTOWSKI, ANDREW	P	OK	06/08/1992			T		8155058002	OKLAHOMA CITY	OK
9216669	SENVISTA GENERAL	P	OK	04/08/1992		08/05/1992	T		8155856004	OKLAHOMA CITY	OK
9218048	ORANGE WIRELESS PARTNERS	P	OK	05/12/1992			T		8155962013	OKLAHOMA CITY	OK
9218102	ROBERTSON, SANFORD R.	P	OK	06/12/1992			T		8155075010	OKLAHOMA CITY	OK
9218141	CONE, S.E., JR.	P	OK	05/11/1992			T		8155964012	OKLAHOMA CITY	OK
9218244	RICHARD CARL LEVY PART	P	OK	09/16/1992			T		8155357002	OKLAHOMA CITY	OK
9318615	CELULARVISION	P	OK	10/02/1992			T		8680011009	OKLAHOMA PMSA	OK
9200734	BACHOW, PAUL S.	P	OK	05/12/1992			T		8155968003	TULSA	OK
9211078	GHZ BROADCASTING INC	P	OK	02/24/1992		05/06/1992	T		8155456014	TULSA	OK
9211555	FOUR M MLDS GROUP	P	OK	05/11/1992			T		8155963011	TULSA	OK
9216671	SENVISTA GENERAL	P	OK	04/08/1992		08/05/1992	T		8155856002	TULSA	OK
9218084	SUITE 12 GROUP	P	OK	06/08/1992			T		8155055002	TULSA	OK
9218087	MEEKER, HERBERT S.	P	OK	06/09/1992			T		8155065005	TULSA	OK
9218107	ROBERTSON, SANFORD R.	P	OK	06/12/1992			T		8155075008	TULSA	OK
9218142	CONE, S.E., JR.	P	OK	05/11/1992			T		8155964011	TULSA	OK
9218246	RICHARD CARL LEVY PART	P	OK	09/22/1992			T		8155379003	TULSA	OK
9318619	CELULARVISION	P	OK	10/16/1992			T		8680052003	TULSA PMSA	OK
9218203	TAGGART, ROBERT B.	P	OR	08/10/1992			T		8155237008	EUGENE	OR
9216021	SUBSCRIBER TV PARTNERS	P	OR	02/20/1992		06/10/1992	T		8155456005	EUGENE MSA	OR
9200210	CAMBRIDGE MANAGEMENT	P	OR	01/24/1992		04/08/1992	T		8155254012	PORTLAND	OR
9210865	CELLULARVISION	P	OR	01/16/1992		02/19/1992	T		8155187004	PORTLAND	OR
9215515	NORTHWEST TELECOMMUNICAT	P	OR	01/13/1992		02/05/1992	S			PORTLAND	OR
9218031	WILLAMETTE VALLEY BROAD	P	OR	05/04/1992			T		8155939002	PORTLAND PMSA	OR
9215629	MYERS, FREDERICK M.	P	OR	01/24/1992		03/18/1992	T		8155254006	PROTLAND PMSA	OR
9215629	MYERS, FREDERICK M.	P	OR	01/24/1992		03/18/1992	T		8155254006	PROTLAND PMSA	OR
9211185	FM VIDEO BROADCASTERS	P	OR	03/17/1992		05/13/1992	T		8155609002	SALEM	OR
9218114	SILBERMAN, MARK	P	OR	06/30/1992			T		8155121004	SALEM	OR
9200735	BACHOW, PAUL S.	P	PA	05/12/1992			T		8155968004	ALLENTOWN	PA
9210279	HUMMEL, DELORES	P	PA	11/04/1991		11/27/1991	TE		8155778007	ALLENTOWN	PA

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9211556	FOUR M MLDS GROUP	P	PA 05/11/1992			T		8155963010	ALLENTOWN	PA
9218044	ORANGE WIRELESS PARTNERS	P	PA 05/12/1992			T		8155962018	ALLENTOWN	PA
9218136	CONE, S.E., JR.	P	PA 05/14/1992			T		8155964017	ALLENTOWN	PA
9218196	METTLER COMMUNICATIONS	P	PA 08/05/1992			T		8155224005	ALLENTOWN	PA
9318630	BSV PARTNERSHIP	P	PA 10/06/1992			T		8680020008	ALLENTOWN PMSA	PA
9218091	MEEKER, HERBERT S.	P	PA 06/09/1992			T		8155065003	ALLENTOWN-BETHLHM	PA
9200736	BACHOW, PAUL S.	P	PA 05/12/1992			T		8155968005	HARRISBURG	PA
9211551	FOUR M MLDS GROUP	P	PA 05/11/1992			T		8155963015	HARRISBURG	PA
9215502	M3 ILLINOIS TELECOM CORP	P	PA 01/13/1992		02/05/1992	S		8155177009	HARRISBURG	PA
9218053	ORANGE WIRELESS PARTNERS	P	PA 05/12/1992			T		8155962008	HARRISBURG	PA
9218151	CONE, S.E., JR.	P	PA 05/11/1992			T		8155964001	HARRISBURG	PA
9216677	RONALD E. SANSAC	P	PA 04/06/1992		08/05/1992	T		8155816006	HARRISBURG MSA	PA
9318628	BSV PARTNERSHIP	P	PA 10/06/1992			T		8680020006	HARRISBURG PMSA	PA
9218035	MAH INC	P	PA 05/04/1992			T		8155939008	HARRISBURG/LEBANON	PA
9318504	MATHES, PHILIP H.	P	PA 10/02/1992			T		8680009007	LANCASTER	PA
9318517	LIKINS, PAUL	P	PA 10/21/1992			T		8680064002	LANCASTER	PA
9111270	LDH INTERNATIONAL INC	P	MA 02/08/1991		05/15/1991	TE		8155674008	PHILADELPHIA	PA
9112780	HOVPRO INVESTMENT GROUP	P	PA 07/15/1991		08/21/1991	TE		8155265009	PHILADELPHIA	PA
9318309	JOS. D. CARNEY & ASSOC.	P	PA 10/02/1992			T		8680004005	PHILADELPHIA MSA	PA
9200742	BACHOW, PAUL S.	P	PA 05/14/1992			T		8155983004	PITSBURGH	PA
9118120	HARATUNIAN, MICHAEL	P	PA 08/19/1991		10/09/1991	TE		8155435002	PITTSBURG	PA
9218066	ORANGE WIRELESS PARTNERS	P	PA 05/18/1992			T		8155996012	PITTSBURG	PA
9210597	ACOR, EVERETT T	P	PA 12/09/1991		01/15/1992	TE		8155940013	PITTSBURGH	PA
9211618	ILOHCA CORP.	P	PA 05/14/1992			T		8155982008	PITTSBURGH	PA
9211677	LINDEMANN, FRAYDA B.	P	PA 05/14/1992			T		8155984004	PITTSBURGH	PA
9211686	FOUR M MLDS GROUP	P	PA 05/18/1992			T		8155996006	PITTSBURGH	PA
9218123	ASSOCIATED MDS CORPO	P	PA 05/15/1992			T		8155990005	PITTSBURGH	PA
9218131	BRENNAN, JOHN E.	P	PA 05/14/1992			T		8155985002	PITTSBURGH	PA
9218137	CONE, S.E., JR.	P	PA 05/18/1992			T		8155997002	PITTSBURGH	PA
9318000	ASSOCIATED MDS CORP	P	PA 10/23/1992			T			PITTSBURGH	PA
9318296	JOS. D. CARNEY & ASSC.	P	PA 10/02/1992			T		8680002009	PITTSBURGH MSA	PA
9215618	R&R TELECOMMUNICATION	P	PA 01/24/1992		03/18/1992	T		8155255011	PITTSBURGH PMSA	PA
9215618	R&R TELECOMMUNICATION	P	PA 01/24/1992		03/18/1992	T		8155255011	PITTSBURGH PMSA	PA
9215889	VIDEO COMMUNICATIONS	P	PA 02/26/1992		05/13/1992	T		8155482005	PITTSBURGH PMSA	PA
9318626	CELULARVISION	P	PA 10/06/1992			T		8680020004	PITTSBURGH PMSA	PA
9318627	BSV PARTNERSHIP	P	PA 10/06/1992			T		8680020005	RANSOM PMSA	PA
9218205	METTLER COMMUNICATIONS	P	PA 08/07/1992			T		8155232005	READING	PA
9318506	MISSIRIAN, RAPHAEL A.	P	PA 10/02/1992			T		8680011004	READING	PA
9200541	AMBY, FAITH C.	P	PA 04/06/1992			T		8155808010	SCRANTON	PA
9211357	RUSSELL HEDDEN	P	PA 04/06/1992		06/24/1992	T		8155816007	SCRANTON	PA
9215466	WIRELESS CABLE LTD	P	CA 12/23/1991		02/05/1992	TE		8155998001	SCRANTON	PA
9216587	PATRICIA B. MAILANI	P	PA 03/06/1992		08/05/1992	T		8155564012	SCRANTON MSA	PA
9218173	SNELLING, CHARLES D.	P	PA 07/07/1992			T		8155142001	SCRANTON-WILKES BARR	PA
9200728	BACHOW, PAUL S.	P	PA 05/12/1992			T		8155969003	YORK	PA
9211547	FOUR M MLDS GROUP	P	PA 05/11/1992			T		8155963019	YORK	PA
9216582	SENVISTA GENERAL	P	PA 03/13/1992		08/05/1992	T		8155604001	YORK	PA
9218051	ORANGE WIRELESS PARTNERS	P	PA 05/12/1992			T		8155962006	YORK	PA
9218150	CONE, S.E., JR.	P	PA 05/11/1992			T		8155964003	YORK	PA
9318505	TOMPKINS, W. WOODRUFF	P	PA 10/02/1992			T		8680011003	YORK	PA
9218117	FREEDOM TECHNOLOGIES	P	PR 07/06/1992			T		8155143001	SAN JUAN	PR
9318510	SMC ASSOCIATES	P	PR 10/09/1992			T		8680036002	SAN JUAN	PR
9218263	CT COMMUNICATIONS CORP	P	RI 09/29/1992			T		8155404005	PAWTUCKET-WOONSOCKET	RI
9118121	ALLIANCE ASSOCIATES	P	RI 08/16/1991		10/09/1991	TE		8155430010	PROVIDENCE	RI
9200743	BACHOW, PAUL S.	P	RI 05/14/1992			T		8155983002	PROVIDENCE	RI
9211312	HORNBY, HAROLD	P	RI 04/07/1992		06/03/1992	T		8155810004	PROVIDENCE	RI
9211689	FOUR M MLDS GROUP	P	RI 05/18/1992			T		8155996003	PROVIDENCE	RI

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9215436	WIRELESS CABLE LTD	P	KY	12/09/1991		02/05/1992	S			PROVIDENCE	RI
9216601	P.M.J. SECURITIES INC	P	RI	03/16/1992		08/05/1992	C		8155705005	PROVIDENCE	RI
9216621	TELECOM/HADDOCK INVESTOR	P	RI	03/24/1992		08/05/1992	T		8155703013	PROVIDENCE	RI
9216640	TELECOM INVESTMENT CORP	P	RI	03/16/1992		08/05/1992	T		8155704002	PROVIDENCE	RI
9218076	ORANGE WIRELESS PARTNERS	P	RI	05/18/1992			T		8155997001	PROVIDENCE	RI
9218130	CONE, S.E. JR	P	RI	05/18/1992			T		8155997003	PROVIDENCE	RI
9215619	R&R TELECOMMUNICATION	P	RI	01/24/1992		03/18/1992	T		8155255014	PROVIDENCE PMSA	RI
9215619	R&R TELECOMMUNICATION	P	RI	01/24/1992		03/18/1992	T		8155255014	PROVIDENCE PMSA	RI
9215999	SUBSCRIBER TV PARTNERS	P	SC	02/24/1992		06/10/1992	T		8155464001	AUGUSTA MSA	SC
9211420	KINGSWOOD ASSOCIATES	P	SC	04/14/1992		06/24/1992	T		8155880004	CHARLESTON	SC
9211942	FORESIGHT COMMUNICATIONS	P	SC	07/20/1992			T		8155172008	CHARLESTON	SC
9216645	SCNY COMMUNICATIONS	P	SC	03/16/1992			T		8155703018	CHARLESTON	SC
9218231	SUITE 12 GROUP	P	SC	08/24/1992			T		8155284002	CHARLESTON	SC
9215936	ROBERT ROSENKRANZ	P	SC	02/13/1992		05/20/1992	T		8155405005	CHARLESTON MSA	SC
9216643	SCNY COMMUNICATIONS	P	SC	03/16/1992			T		8155703020	COLUMBIA	SC
9218096	ROBERTSON, JEANNE P.	P	SC	06/12/1992			T		8155075005	COLUMBIA	SC
9218189	BSV PARTNERSHIP	P	SC	08/10/1992			T		8155237007	COLUMBIA	SC
9216019	SUBSCRIBER TV PARTNERS	P	SC	02/20/1992		06/10/1992	T		8155456007	COLUMBIA MSA	SC
9318622	CELULARVISION	P	SC	10/16/1992			T		8680052001	COLUMBIA PMSA	SC
9210967	EDELSON, HARRY	P	SC	01/24/1992		03/25/1992	T		8155254007	GREENVILLE	SC
9211718	KRZETTOWSKI, ANDREW J.	P	SC	05/26/1992			T		8155019005	GREENVILLE	SC
9215891	SENVISTA GENERAL	P	SC	02/26/1992		05/13/1992	T		8155481006	GREENVILLE	SC
9216646	SCNY COMMUNICATIONS	P	SC	03/16/1992			T		8155703017	GREENVILLE	SC
9218104	MITCHELL, DAVID JAN	P	SC	06/16/1992			T		8155082004	GREENVILLE	SC
9318618	CELULARVISION	P	SC	10/16/1992			T		8680052004	GREENVILLE PMSA	SC
9318508	BUTLER, LAWRENCE	P	TN	10/15/1992			T		8680048008	BUFFALO MOUNTAIN	TN
9218195	KINGSWOOD ASSOCIATES	P	TN	08/05/1992			T		8155224001	CHATTANOOGA	TN
9318515	BUTLER, MICHAEL	P	TN	10/15/1992			T		8680048007	CHATTANOOGA	TN
9318610	CELULARVISION	P	TN	10/02/1992			T		8680009002	CHATTANOOGA PMSA	TN
9318607	CELULARVISION	P	TN	10/02/1992			T		8680009006	KINGSPORT PMSA	TN
9200729	BACHOW, PAUL S.	P	TN	05/12/1992			T		8155969002	KNOXVILLE	TN
9211076	GHZ BROADCASTING INC	P	TN	02/24/1992		05/06/1992	T		8155456016	KNOXVILLE	TN
9211549	FOUR M MLDS GROUP	P	TN	05/11/1992			T		8155963017	KNOXVILLE	TN
9218055	ORANGE WIRELESS PARTNERS	P	TN	05/12/1992			T		8155962010	KNOXVILLE	TN
9218099	ROBERTSON, JEANNE P.	P	TN	06/12/1992			T		8155075002	KNOXVILLE	TN
9218121	PEYSER, FREDERICK M.	P	TN	07/06/1992			T		8155141001	KNOXVILLE	TN
9218152	CONE, S.E., JR.	P	TN	05/11/1992			T		8155964002	KNOXVILLE	TN
9218165	ALDA MULTICHANNELS, LTD	P	TN	06/17/1992			T		8155088005	KNOXVILLE	TN
9218245	RICHARD CARL LEVY PART	P	TN	09/22/1992			T		8155379004	KNOXVILLE	TN
9318608	CELULARVISION	P	TN	10/02/1992			T		8680009004	KNOXVILLE PMSA	TN
9200721	BACHOW, PAUL S.	P	TN	05/12/1992			T		8155971002	MEMPHIS	TN
9210267	BROWN, DAVID	P	TN	11/01/1991		11/27/1991	TE		8155772004	MEMPHIS	TN
9210732	CORNBLATT, ARNOLD	P	TN	01/03/1992		02/12/1992	TE		8155066008	MEMPHIS	TN
9211600	FOUR M MLDS GROUP	P	TN	05/11/1992			T		8155963006	MEMPHIS	TN
9211829	HIGH BAND BROADCASTING	P	TN	06/18/1992			T		8155091003	MEMPHIS	TN
9218075	ORANGE WIRELESS PARTNERS	P	TN	05/11/1992			T		8155962012	MEMPHIS	TN
9218144	CONE, S.E., JR.	P	TN	05/11/1992			T		8155964009	MEMPHIS	TN
9218200	VICK, MAURICE M. & CHARL	P	TN	08/07/1992			T		8155234005	MEMPHIS	TN
9215832	ROBERT ROSENKRANZ	P	TN	02/13/1992		04/29/1992	T		8155405002	MEMPHIS MSA	TN
9200367	AMBY, FAITH C.	P	TN	03/06/1992			T		8155564002	NASHVILLE	TN
9200527	ASSOCIATED MDS CORP	P	TN	04/06/1992			T		8155808003	NASHVILLE	TN
9200551	BACHOW, PAUL S.	P	TN	04/06/1992			T		8155817005	NASHVILLE	TN
9200585	CONE, S.E., JR.	P	TN	04/06/1992			T		8155811004	NASHVILLE	TN
9210576	ELECTRONIC RETAILING SYS	P	TN	12/05/1991		01/15/1992	TE		8155919007	NASHVILLE	TN
9211310	LEVIN, MICHAEL H.	P	TN	04/07/1992		06/03/1992	T		8155810001	NASHVILLE	TN
9215413	R&R TELECOMMUNICATION	P	TN	12/30/1991		02/05/1992	TE			NASHVILLE	TN

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9215445	NEW SOUTH ASSOCIATES	P	FL 12/05/1991		02/05/1992	TE			NASHVILLE	TN
9218004	ORANGE WIRELESS PARTNERS	P	TN 04/07/1992			T		8155811007	NASHVILLE	TN
9218082	SUITE 12 GROUP	P	TN 06/08/1992			T		8155055004	NASHVILLE	TN
9211074	KING BROADCASTING ASSOC	P	TX 02/24/1992		05/06/1992	T		8155456003	ABILENE	TX
9218248	RICHARD CARL LEVY PART	P	TX 09/22/1992			T		8155379005	ABILENE	TX
9211943	KING BROADCASTING ASSOC	P	TX 07/20/1992			T		8155173003	AMARILLO	TX
9318501	MEGERDICHIAN, JACK	P	TX 10/02/1992			T		8680009005	AMARILLO	TX
9200455	BMB PARTNERSHIP	P	TX 04/13/1992		07/08/1992	T		8155878006	AUSTIN	TX
9200469	ASSOCIATED MDS CORP	P	TX 04/14/1992		07/15/1992	T		8155886005	AUSTIN	TX
9200598	BACHOW, PAUL S.	P	TX 04/14/1992			T		8155888006	AUSTIN	TX
9210730	LONERGAN, WILLIAM R.	P	TX 01/02/1992		02/12/1992	TE		8155101001	AUSTIN	TX
9210731	JORGENSEN, DAVID G.	P	TX 01/03/1992		02/12/1992	TE		8155068008	AUSTIN	TX
9211419	KINGSWOOD ASSOCIATES	P	TX 04/14/1992		06/24/1992	T		8155880005	AUSTIN	TX
9211423	MARK B. FISHER	P	TX 04/14/1992		06/24/1992	T		8155878003	AUSTIN	TX
9211427	FOUR M MLDS GROUP	P	TX 04/13/1992			T		8155882007	AUSTIN	TX
9216656	ORANGE WIRELESS	P	TX 04/13/1992			T		8155881007	AUSTIN	TX
9216666	M.M. & C.O. VICK PARTNER	P	TX 04/14/1992			T		8155887003	AUSTIN	TX
9318285	ASSOC. MDS CORP.	P	TX 10/02/1992			T		8155886004	AUSTIN	TX
9218193	KINGSWOOD ASSOCIATES	P	TX 08/05/1992			T		8155224003	BEAUMONT	TX
9318603	WILLIAM H. WILLIAMS	P	TX 10/02/1992			T		8680009010	BEAUMONT PMSA	TX
9216654	UNIVERSITY OF TEXAS	P	TX 04/10/1992			T		8155868003	BROWNSVILLE	TX
9215180	RIOVISION OF TEXAS	P	TX 11/15/1991		12/26/1991	S			BROWNVILLE	TX
9318604	WILLIAM H. WILLIAMS	P	TX 10/02/1992			T		8680009009	CORPUS CHRISTI PMSA	TX
9117537	PETER RINFRET	P	TX 07/15/1991		09/25/1991	S			DALLAS	TX
9318509	METROCOM TELECASTING	P	TX 10/01/1992			T		8680006001	DALLAS	TX
9110799	LDH INTERNATIONAL INC	P	TX 12/24/1990		05/15/1991	TE		8155586002	DALLAS-FORT WORTH	TX
9200600	BACHOW, PAUL S.	P	TX 04/14/1992			T		8155888003	EL PASO	TX
9210706	BUCHWALD, JOSEPH B.	P	TX 12/30/1991		02/12/1992	TE		8155037003	EL PASO	TX
9211422	TOM ELLIOTT	P	TX 04/14/1992		06/24/1992	T		8155877005	EL PASO	TX
9211431	FOUR M MLDS GROUP	P	TX 04/13/1992			T		8155882003	EL PASO	TX
9216593	SENVISTA GENERAL	P	TX 03/06/1992		08/05/1992	T		8155757001	EL PASO	TX
9216658	ORANGE WIRELESS	P	TX 04/13/1992		08/05/1992	T		8155881005	EL PASO	TX
9215623	ROBERT E. LA BLANC	P	TX 01/24/1992		03/18/1992	T		8155254003	EL PASO MSA	TX
9215623	ROBERT E. LA BLANC	P	TX 01/24/1992		03/18/1992	T		8155254003	EL PASO MSA	TX
9215943	WESTERN SIERRA	P	TX 02/18/1992		05/20/1992	T		8155441010	EL PASO MSA	TX
9200525	ASSOCIATED MDS CORP	P	TX 04/06/1992			T		8155811014	FT WORTH	TX
9200545	BRENNAN, JOHN E.	P	TX 04/06/1992			T		8155818004	FT WORTH	TX
9200554	BACHOW, PAUL S.	P	TX 04/06/1992			T		8155817002	FT WORTH	TX
9200587	CONE, S.E., JR	P	TX 04/06/1992			T		8155811002	FT WORTH	TX
9211349	LINDEMANN, FRAYDA B.	P	TX 04/08/1992		06/17/1992	T		8155818001	FT WORTH	TX
9215458	JAMES L. MELCHER	P	TX 12/26/1991		02/05/1992	TE			FT WORTH	TX
9218009	ORANGE WIRELESS PARTNERS	P	TX 04/07/1992			T		8155811012	FT WORTH	TX
9211090	KELLY, PAUL N.	P	TX 02/10/1992		04/29/1992	T		8155369009	FT. WORTH	TX
9215150	ROY TARTAGLIA	P	TX 11/04/1991		12/11/1991	TE			FT. WORTH	TX
9215941	WESTERN SIERRA	P	TX 02/18/1992		05/20/1992	T		8155441012	GALVESTON MSA	TX
9111273	LDH INTERNATIONAL INC	P	TX 02/08/1991		05/15/1991	TE		8155674011	HOUSTON	TX
9112777	KAVID KOFFMAN	P	TX 07/15/1991		10/02/1991	TE		8155264006	HOUSTON	TX
9218161	ALDA MULTICHANNELS, LTD	P	TX 06/17/1992			T		8155088009	HOUSTON	TX
9211452	FORESIGHT COMMUNICATIONS	P	TX 04/21/1992		06/24/1992	T		8155901008	LAREDO	TX
9218094	SUMMIT ADVISORY,LTD THE	P	TX 06/15/1992			T		8155077001	LAREDO	TX
9218227	MONTGOMERY, ROBERT L	P	TX 08/24/1992			T		8155284004	LAREDO	TX
9200462	CACTUS TELEVISION INTER	P	TX 04/13/1992			T		8155880007	LUBBOCK	TX
9318277	CT COMM. CORP.	P	TX 10/02/1992			T		8155403001	MCAL.EDIN.MISSN. MSA	TX
9215179	RIOVISION OF TEXAS	P	TX 11/15/1991		12/26/1991	S			MCALLEN	TX
9216655	UNIVERSITY OF TEXAS	P	TX 04/10/1992			T		8155869002	MCALLEN	TX
9211944	KING BROADCASTING ASSOC	P	TX 07/20/1992			T		8155173002	MIDLAND	TX

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9218181	KING BROADCASTING ASSOC.	P	TX	06/20/1992			T		8155172002	ODESSA MSA	TX
9218202	KING BROADCASTING ASSOC	P	TX	08/10/1992			T		8155236010	SAN ANGELO	TX
9200720	BACHOW, PAUL S.	P	TX	05/12/1992			T		8155971003	SAN ANTONIO	TX
9210278	LEVINE, D. CHRISTOPHER	P	TX	11/04/1991		11/27/1991	TE		8155778006	SAN ANTONIO	TX
9211130	HORNBY, HAROLD	P	TX	03/09/1992		05/13/1992	T		8155564009	SAN ANTONIO	TX
9211602	FOUR M MLDS GROUP	P	TX	05/11/1992			T		8155963004	SAN ANTONIO	TX
9215433	WIRELESS CABLE LTD	P	KY	12/09/1991		02/05/1992	S			SAN ANTONIO	TX
9218045	ORANGE WIRELESS PARTNERS	P	TX	05/12/1992			T		8155962002	SAN ANTONIO	TX
9218108	PMB PARNTERSHIP	P	TX	06/16/1992			T		8155082012	SAN ANTONIO	TX
9218148	CONE, S.E., JR.	P	TX	05/11/1992			T		8155964005	SAN ANTONIO	TX
9200212	CAMBRIDGE MANAGEMENT	P	TX	01/24/1992		04/08/1992	T		2155254010	SAN ANTONIO, TX MSA	TX
9211451	FORESIGHT COMMUNICATIONS	P	TX	04/21/1992		06/24/1992	T		8155901009	TYLER	TX
9218190	CHOREKCHYAN, GAYK	P	TX	08/24/1992			T		8155284007	TYLER	TX
9218197	METTLER COMMUNICATIONS	P	TX	08/05/1992			T		8155224006	WACO	TX
9318605	WILLIAM H. WILLIAMS	P	TX	10/02/1992			T		8680009008	WACO PMSA	TX
9218210	SMITH, WILLIAM L.	P	UT	08/10/1992			T		8155241001	PROVO	UT
9200593	BSV PARTNERSHIP	P	UT	04/17/1992			T		8155896002	SALT LAKE CITY	UT
9210915	CLARK, THOMAS FRANCIS	P	UT	01/23/1992		02/19/1992	T		8155233003	SALT LAKE CITY	UT
9211460	HORNBY, HENRI R	P	UT	04/20/1992			T		8155901014	SALT LAKE CITY	UT
9215812	SMITH, KATHLEEN	P	UT	02/10/1992		04/29/1992	T		8155370004	SALT LAKE CITY	UT
9216592	SENVISTA GENERAL	P	UT	03/06/1992		08/05/1992	T		8155757004	SALT LAKE CITY	UT
9218160	KRZETTOWSKI, ANDREW	P	UT	06/17/1992			T		8155088010	SALT LAKE CITY	UT
9218012	WILLIAM L. SMITH	P	UT	04/20/1992			T		8155901013	SALT LAKE MSA	UT
9210972	EDELSON, HARRY	P	VA	01/27/1992		03/25/1992	T		8155255009	NORFOLK	VA
9215151	WILLIAM P. TAVOULAREAS	P	VA	11/04/1991		12/11/1991	TE			NORFOLK	VA
9215368	SHENANDOAH GROUP	P	NC	12/05/1991		01/29/1992	S			NORFOLK	VA
9216588	PATRICIA B. MAILANI	P	VA	03/06/1992		08/05/1992	T		8155564011	NORFOLK MSA	VA
9318308	JOS. D. CARNEY & ASSOC.	P	VA	10/02/1992			T		8680004004	NORFOLK MSA	VA
9200456	BMB PARTNERSHIP	P	VA	04/13/1992			T		8155878007	RICHMOND	VA
9200467	CONE, S.E., JR	P	VA	04/13/1992			T		8155882009	RICHMOND	VA
9200599	BACHOW, PAUL S.	P	VA	04/14/1992			T		8155888005	RICHMOND	VA
9200649	ASSOCIATED MDS CORP	P	VA	04/14/1992			T		8155886003	RICHMOND	VA
9210698	BAY BROADCASTING ASSOC	P	VA	12/24/1991		02/12/1992	TE		8155998005	RICHMOND	VA
9210736	CLARK, THOMAS FRANCIS	P	VA	01/06/1992		02/12/1992	TE		8155123007	RICHMOND	VA
9211428	FOUR M MLDS GROUP	P	VA	04/13/1992			T		8155882006	RICHMOND	VA
9216596	P.M.J. SECURITIES INC	P	VA	03/16/1992		08/05/1992	C		8155705014	RICHMOND	VA
9216618	TELECOM/HADDOCK INVESTOR	P	VA	03/24/1992		08/05/1992	T		8155703001	RICHMOND	VA
9216625	TELECOM INVESTMENT CORP	P	VA	03/16/1992		08/05/1992	T		8155704015	RICHMOND	VA
9216653	WILLIAM MCKISSOUCK	P	VA	04/13/1992			T		8155877006	RICHMOND	VA
9216657	ORANGE WIRELESS	P	VA	04/13/1992			T		8155881006	RICHMOND	VA
9216663	M.M. & C.O. VICK PARTNER	P	VA	04/14/1992			T		8155887005	RICHMOND	VA
9318606	CELULARVISION	P	VA	10/02/1992			T		8680011010	ROANOKE PMSA	VA
9218249	CT COMMUNICATIONS CORP	P	WA	09/29/1992			T		8155398001	BREMERTON	WA
9211454	FORESIGHT COMMUNICATIONS	P	WA	04/20/1992		06/24/1992	T		8155901006	OLYMPIA	WA
9218226	MCKISSOCK, WILLIAM J.	P	WA	08/24/1992			T		8155284003	OLYMPIA	WA
9218264	CT COMMUNICATIONS CORP	P	WA	09/29/1992			T		8155404006	OLYMPIA	WA
9111303	LDH INTERNATIONAL INC	P	WA	02/20/1991		05/15/1991	TE		8155709005	SEATTLE-EVERETT	WA
9112781	HOVNANIAN, ARA K	P	WA	07/15/1991		08/21/1991	TE		8155264001	SEATTLE-TACOMA	WA
9200665	BSV PARTNERSHIP	P	WA	06/16/1992			T		8155082014	SPOKANE	WA
9211133	HORNBY, HAROLD	P	WA	03/06/1992		05/13/1992	T		8155564004	SPOKANE	WA
9211356	SARKIS KRIKORIAN	P	WA	04/06/1992		06/24/1992	T		8155816005	SPOKANE	WA
9215446	NEW SOUTH ASSOCIATES	P	FL	12/05/1991		02/05/1992	TE			SPOKANE	WA
9318519	SKYLINE ENTRTNMNT NTWORK	P	WA	10/23/1992			T		8680075014	SPOKANE	WA
9200457	BMB PARTNERSHIP	P	WA	04/13/1992			T		8155877007	TACOMA	WA
9210710	JORGENSEN, DAVID G.	P	WA	12/26/1992		02/12/1992	TE		8155032003	TACOMA	WA
9211823	HASCOE, NORMAN	P	WA	06/17/1992			T		8155087002	TACOMA	WA

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9218225	TOMPKINS, W. WOODRUFF	P	WA 08/24/1992			T		8155284005	TACOMA	WA
9218183	TITLE TOWN TV	P	WI 07/20/1992			T		8155172007	GREEN BAY	WI
9218115	SILBERMAN, MARK	P	WI 06/30/1992			T		8155121005	MADISON	WI
9218258	CT COMMUNICATIONS CORP	P	WI 09/29/1992			T		8155398009	MADISON	WI
9216578	MADISON WIRELESS	P	WI 03/16/1992		08/05/1992	S		8155609004	MADISON MSA	WI
9318268	PAUL LIKINS	P	WI 10/02/1992			T		868001004	MADISON, WI MSA	WI
9200604	BACHOW, PAUL S.	P	WI 04/30/1992			T		8155934002	MILWAUKEE	WI
9200670	BSV PARTNERSHIP	P	WI 05/04/1992			T		8155943002	MILWAUKEE	WI
9210961	FEINBERG, JUDY	P	WI 01/13/1992		03/04/1992	T		8155178004	MILWAUKEE	WI
9211526	FOUR M MLDS GROUP	P	WI 05/04/1992			T		8155944002	MILWAUKEE	WI
9211530	ILOHCA CORP	P	WI 05/04/1992			T		8155943003	MILWAUKEE	WI
9215152	CLAY MARSTON	P	WI 11/01/1991		12/11/1991	TE			MILWAUKEE	WI
9218039	ORANGE WIRELESS PARTNERS	P	WI 05/05/1992			T		8155944004	MILWAUKEE	WI
9218122	CONE, S.E., JR.	P	WI 05/04/1992			T		8155944003	MILWAUKEE	WI
9218162	ALDA MULTICHANNELS, LTD	P	WI 06/17/1992			T		8155088008	MILWAUKEE	WI
9215937	ROBERT ROSENKRANZ	P	WI 02/13/1992		05/20/1992	T		8155405006	MILWAUKEE PMSA	WI
9218198	VIRGINIA COMMUNICATIONS	P	WV 08/05/1992			T		8155224004	HUNTINGTON	WV
9218211	HUGHES, LEONARD	P	WY 08/10/1992			T		8155236004	CASPER	WY
9218214	HUGHES, LEONARD	P	WY 08/10/1992			T		8155236006	CHEYENNE	WY

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